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No. 90-

In the Supreme Court of the United States of America

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

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APPENDIX

No. 90-5927

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff,

versus

MANUEL ANTONIO NORIEGA

Defendant-Appellee,

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,

Appellants.

Appeal from the United States District Court for the Southern District of Florida

No. 90-5932

IN RE:
CABLE NEWS NETWORK, INC. and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners.

On Petition for Writ of Mandamus or Prohibition to the United States District Court for the Southern District of Florida

(November 10, 1990)

BEFORE: JOHNSON, HATCHETT and BIRCH, Circuit Judges.

PER CURIAM:

This matter is before us on the "emergency motion" of appellants Cable News Network, Inc. and Turner Broadcasting System, Inc. (collectively "CNN") to vacate three orders issued by the United States District Court for the Southern District of Florida (the "District Court"). This case presents a difficult question regarding the District Court's responsibility to balance the Sixth Amendment right to a fair trial of the defendant, General Manuel Antonio Noriega ("Noriega"), with CNN's First Amendment right to be free from prior restraints against the broadcasting of newsworthy information.

I. BACKGROUND

General Noriega is presently incarcerated at the Metropolitan Correctional Center ("MCC") in Dade County, Florida. CNN wishes to broadcast recordings of telephone conversations between Noriega and his defense counsel, which

were allegedly taped by the government while Noriega was in prison and obtained by CNN from an undisclosed source. Case No. 90-5926 is CNN's appeal of an oral order that prohibits it from broadcasting certain tape recordings in its possession until 6:00 p.m. on November 8, 1990. Case No. 90-5927 is CNN's appeal from two written orders of the District Court.[1] Subsequent to the filing of the above-described motions by CNN, it filed an additional petition, denominated "Appellants' Petition for a Writ of Mandamus or Prohibition," in which CNN seeks an order from this Court "directing the District Court below to refrain from hearing a Motion for Contempt filed by Manuel Antonio Noriega" and seeking disqualification of District Court Judge William Hoeveler pursuant to 28 U.S.C. § 455 (No. 90-5932).

At the outset, we note that this Court lacks jurisdiction to hear Case No. 90-5926 because the appeal is from an oral order that has not been entered on the docket of the District Court. *See* Fed. R. App. P. 4(a). Accordingly, that appeal did not divest the District Court of jurisdiction to enter the two written orders that are the subject of Case No. 90-5927. Noriega originally petitioned the District Court for injunctive relief, and CNN has framed its appeal as an "Emergency Motion To Vacate An Unconstitutional Prior Restraint," but the case is not appealable in its present posture.[2] In any event,

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[1] The first written order, dated November 8, 1990, continued the temporary restraint ("TRO") in the oral order until CNN produced the tape recordings in its possession so the District Court could review the contents of those recordings to reach a decision on the merits. The second written order, dated November 9, 1990, clarified the first written order and specified that the restraint would remain in effect for up to ten days, or until such lesser time as the District Court needed to decide the issue on the merits after review of the tape recordings.

[2] *McDougald v. Jenson*, 786 F.2d 1465, 1472 (11th Cir. 1986) ("It is well settled in this circuit that a TRO is not ordinarily

CNN's motion is more properly viewed as a petition for a writ of mandamus against the District Court to correct an abuse of discretion.[3] *See Goldblum v. National Broadcasting Corp.*, 584 F.2d 904, 906 n.2 (9th Cir. 1978). *In re: Capital Cases/ABC, Inc.*, No. 90-7749, slip op. (11th Cir. Nov. 2, 1990). Accordingly, with respect to Case No. 90-5927, we will treat CNN's motion as a petition for mandamus relief.

In his "Memorandum Of Law In Support Of Motion For Injunctive Relief" ("Noriega's Motion"), Noriega sought to prevent CNN from broadcasting the recorded conversations between Noriega and his attorneys. He did *not* seek to enjoin CNN from reporting on the government's taping of the conversations, and argued that "an order directing CNN not to broadcast the tapes is sufficiently narrow [to] protect the interests of the press as well as the defendant."[4] Noriega's

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appealable."). *See Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426 (5th Cir. Unit A Aug. 1981).

[3] The Supreme Court has stated that "the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S.Ct. 1133, 1143, 99 L.Ed.2d 296 (1988). Even if exceptional circumstances exist to justify mandamus relief, however, the party seeking mandamus bears the burden of demonstrating a "clear and indisputable" right to issuance of the writ. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 74 S.Ct. 145, 148, 98 L.Ed.2d 106 (1953).

[4] This court has reviewed the videotape of the proposed news story (a telecast of which was broadcast once on November 7, 1990 prior to entry of the TRO) and notes, as represented in CNN's brief that "[t]he aural content of the tape [of attorney client communications] is not audible in the telecast." We also observe that Noriega's defense counsel, Mr. Frank A. Rubino ("Rubino") cooperated with CNN by reviewing an audio tape of conversation purportedly between Noriega and Ms. Cristina Machin ("Machin") (Rubino's secretary and interpreter) and verified the authenticity of the tape recording. A portion of the interview between a CNN reporter and Rubino (together with Machin) in Rubino's office appears in the telecast. With respect to such conduct we are mindful of the Supreme Court's admonition: "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only

Motion at 6. Although the restraint imposed by the District Court could arguably be read to embrace the CNN news report about the recordings as well as the recordings themselves, this order will only address the subject matter of Noriega's Motion, the recorded conversations between Noriega and his defense team.[5]

The District Court in entering the TRO, in an effort to maintain the status quo pending a determination on the merits, commented:

> . . . Assuming, however, that there are at least some circumstances in which the First Amendment prohibits the prior restraint of even privileged attorney-client communication, the Supreme Court's pronouncements on the doctrine of prior restraint suggest that a factual inquiry is required. . . . As was stated in the court's Order, the contents of the tape recordings were not before the court. Thus, the court was in effect being asked to make a factual determination without being allowed to review the facts. On this point, it is important to note that CNN is in possession of the tapes, and has resisted turning them over to the court for review. It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court — that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate

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subject to regulation, but is highly censurable and worthy of disciplinary measures." *Shepard v. Maxwell*, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) (cited with approval in *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683 (1976).

[5] We have been advised that CNN, in disregard and defiance of the District Court's explicit restraining order, broadcast this news report.

harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession. In response to the portion of the court's Order requiring production of the tapes to this court for the Magistrate's review, CNN argues that the court should compel production of the tapes from the Government before looking to CNN.[1]

* * *

The court herein wishes to emphasize that its Order was not a decision on the merits of the request for injunction, but rather a temporary restraint until such time as the Magistrate could review the tapes and permit this court to make a determination based on the merits. . . . But the unique nature of the problem facing this court, unlike other courts which have faced this issue, is that no such determination was nor is possible without knowing the precise contents of the speech sought to be restrained, here the privileged attorney-client communications in CNN's possession.

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[1] The court notes that a review of the tapes in the Government's possession would not necessarily allow the court to determine whether or not disclosure of CNN's tapes would inpair Noriega's right to a fair trial. It is entirely possible that CNN is in possession of communications between Noriega and his lawyers and staff which the Government did not record, since it appears that the Government did not tape all of Noriega's attorney-client conversations. The communications in CNN's possession might have been recorded from a location outside of the prison where Noriega is incarcerated.

II. DISCUSSION

A. The District Court's Obligation When Confronted With Allegations Of Prejudicial Publicity.

"[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 260, 62 S. Ct. 190, 192, 86 L.Ed. 192 (1941). Within the context of pretrial and trial proceedings, a district court is often called upon to make this critical and difficult choice.[6] Balancing the First and Sixth Amendment concerns involved in a widely publicized, hence "sensational", criminal case, the former Fifth Circuit concluded that the trial court is accorded broad discretion to accomplish its primary responsibility of ensuring that the accused has a fair trial:

> The right of access to criminal proceedings becomes a highly controversial issue when First Amendment questions must be analyzed in conjunction with competing Sixth Amendment considerations. "A heavy obligation rests on trial judges to effectuate the fair-trial guarantee of the Sixth Amendment." *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 104 (5th Cir. 1974). "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, trial courts must take strong measures to ensure that the balance is never weighed against the accused."

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[6] The Supreme Court has recognized a First Amendment right of access to criminal trials, but not to pretrial proceedings. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984) *(Press-Enterprise I)*; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality opinion).

Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). In a widely publicized case, "the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial." Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 394 (1968).

Thus, it is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process. The trial judge is therefore granted broad discretion in ordering the daily activities of his court. *Id.* at 401. "[A] trial judge should have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammmatory publicity." *Columbia Broadcasting System, Inc. v. Young, supra*, 522 F.2d at 241. See also, *United States v. Schiavo, supra*, 504 F.2d at 6; *United States v. Columbia Broadcasting System, Inc., supra*, 497 F.2d at 106-07. Within this discretion, therefore, the district judge can place restrictions on parties, jurors, lawyers, and others involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations. *Sixth Amendment rights of the accused must be protected always. United States v. Columbia Broadcasting System, Inc., supra; United States v. Schiavo, supra.*

United States v. Gurney, 558 F.2d 1202, 1209-10 (5th Cir. 1977) (emphasis added), *cert. denied*, 435 U.S. 968, 98 S. Ct. 1606, 56 L.Ed.2d 59 (1978); *see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570, 96 S. Ct. 2791, 2808, 49 L.Ed.2d 683 (1976) ("This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a

prior restraint can never be employed."); *Estes v. Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L.Ed.2d 543 (1965) (The right to a fair trial is so basic to our legal system that it has been called "the most fundamental of all freedoms."); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 488 U.S. 946, 109 S. Ct. 377, 102 L.Ed.2d 365 (1988) ("When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter.").

Furthermore, the Supreme Court has held that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 98 S. Ct. 1306, 1318, 55 L.Ed.2d 570 (1978); *Gurney*, 558 F.2d at 1208. Obviously, the general public has no right to private communications between a defendant and his counsel. Utilizing the principle that the press is entitled to no more information than the public together with concern regarding the subsequent fair trial of another defendant, the Fifth Circuit upheld a district court's denial of broadcasting stations' separate requests to broadcast audiotaped discussions between Federal Bureau of Investigation agents and defendants which occurred in a "sting" operation. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. Unit A Aug. 1981).[7] The Fifth Circuit

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[7] In pertinent part, the district court's opinion denying the broadcasting stations' request to broadcast the audiotapes states as follows:

> Widespread publication of these tapes prior to trial will severely prejudice Mr. Moore's [the defendant to be tried later] sixth amendment right to a fair trial, as well as potentially deny him rights guaranteed by the fourth and fifth amendments. Moreover, if the tapes are prematurely heard by the public, this court would be severely hampered in selecting a fair and impartial jury in the forthcoming trial.

Belo Broadcasting Corp., 654 F.2d at 425.

determined that the Constitution did not accord the broadcasting stations the right to play the tapes over the air waves. *Id.* at 427. "It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." *Id.* at 431.

Notwithstanding the District Court's broad discretion in determining First Amendment interests with respect to a criminal defendant's Sixth Amendment right to a fair trial, a general, conclusory representation that publicity might deprive a defendant's right to a fair trial is insufficient. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 2744, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*) ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]."); *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 104 (5th Cir. 1974) ("[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " (quoting *Craig v. Harney*, 331 U.S. 367, 376, 67 S. Ct. 1249, 1255, 91 L.Ed. 1546 (1947))). In the analogous situation of a trial court's closing a pretrial proceeding to protect a defendant's right to a fair trial, the Supreme Court required specific factual findings that: 1) there is a substantial probability that the defendant's right to a fair trial will be prejudiced by the publicity; 2) there is a substantial probability that closure would prevent that prejudice, and 3) reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. 478 U.S. at 14, 106 S. Ct. at 2743. The purpose of requiring specific findings is to demonstrate that " 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " 478 U.S. at , 106 S. Ct. at 2743 (quoting *Press-Enterprise Co. v. Superior*

Court, 464 U.S. 501, 510, 104 S. Ct. 819, 824, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*); *see Belo Broadcasting Corp.*, 654 F.2d at 430 ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."); *Columbia Broadcasting System I*, 497 F.2d at 106 (For "a danger [to be] sufficient to warrant a prior restraint, it is basic constitutional law that the limitation can be no broader than necessary to accomplish the desired goal."). In the context of a suppression hearing, the Supreme Court directed the trial court, considering closure because of privacy interests implicated in wiretapped conversations, to determine "whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216, 81 L.Ed.2d 31 (1984).

The Supreme Court has recognized that prejudicial pretrial publicity can defeat a defendant's right to a fair trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961); *see Patterson v. Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L.Ed. 879 (1907) ("[T]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). The Court has placed an affirmative duty on trial courts to guard against privileged pretrial publicity:

> To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

Gannett Co. v. DePasquale, 443 U.S. 368, 378, 99 S. Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). Even if the attorney-client communications in this case were determined *not* to be privileged, the district court may decide that the disclosure of these communications may constitute an impediment to Noriega's fair trial.

Under Supreme Court and Eleventh Circuit precedent, the district court's determination of privilege cannot be conclusory, but must be definitively and explicitly stated based on the particular facts and circumstances of this case. *See Gurney*, 558 F.2d at 1211 ("The district court's rulings denying press access implemented a legitimate governmental interest in securing for the accused the fair trial guaranteed by the Sixth Amendment. The court's actions bore a reasonable relation to the achievement of that purpose."). We emphasize that it is essential that the District Court delineate carefully its reasons for proscribing the broadcasting of the tapes in question, guided by the three considerations of *Press-Enterprise II*. Particular attention should be given to the Sixth Amendment concern for an impartial jury. *See Belo Broadcasting Corp.*, 654 F.2d 423 (5th Cir. Unit A Aug. 1981).

The District Court must possess the subject tapes in order to make its *in camera* determination of whether the attorney-client communications are privileged. We are troubled by CNN's refusal to obey the District Court's order to release the tapes in question to the court.[8]

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[8] *United States v. Columbia Broadcasting Sys., Inc.*, 497 F.2d 107, 109 (5th Cir. 1974). The former Fifth Circuit found that the district court held Columbia Broadcasting System, Inc. (CBS) in criminal contempt for telecasting sketches of scenes from a publicized criminal trial in defiance of the court's order, but remanded the case for trial of the contempt action before another judge instead of the trial judge who ordered CBS not to televise the sketches.

With national and international significance and implications, Noriega's trial has received unprecedented media coverage. In light of this status, "[t]he Sixth Amendment's guarantee of an impartial jury . . . is an obligation of the nation, not the accused. It is not his duty to provide an impartial jury." *Levine v. United States District Court*, 764 F.2d 590, 602 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). In our nation, the courts are charged with safeguarding a defendant's right to a fair trial and with cautiously balancing First Amendment and Sixth Amendment interests. "It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." *Nebraska Press Ass'n*, 427 U.S. at 560, 96 S.Ct. at 2803.

B. The Existence Of The Attorney-Client Privilege As It Relates To The District Court's Review And Analysis Of Potential Harm To Noriega.

The purpose of the attorney-client privilege is to encourage open and complete communication between a client and his attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications. *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987). In order to invoke this privilege, the claimant must establish the following:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of

> securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978) (quoting *In re Grand Jury Proceedings,* 517 F.2d 686, 670 (5th Cir. 1975).

The attorney-client privilege is not absolute. Because it "serves to obscure the truth, . . . it should be construed as narrowly as is consistent with its purpose." *Suarez,* 820 F.2d at 1160. Thus, this court has developed a two-part analysis to determine when the attorney-client privilege protects a communication between an attorney and his client from government intrusion.[9] A communication between an attorney and his client will be protected if it is: "(1) intended to remain confidential *and* (2) under the circumstances was *reasonably* expected and understood to be confidential." *United States v. Bell,* 776 F.2d 965, 971 (11th Cir. 1985) (emphasis in original) (quoting *United States v. Melvin,* 650 F.2d 641, 645 (5th Cir. Unit B 1981).

In applying the law surrounding the attorney-client privilege to the facts of this case, for the purpose of discussion we will first assume that Noriega did sign a valid release evidencing his understanding that *all* of his telephone conversations, including those with members of his defense team, would be

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[9] Because "a communication between an attorney and his client that is protected by the common law attorney-client privilege is also protected from government intrusion by the sixth amendment," *United States v. Blasco,* 702 F.2d 1315, 1329 (11th Cir. 1983), this discussion of attorney-client privilege encompasses the Sixth Amendment right to effective assistance of counsel.

recorded.[10] Under such circumstances, it is conceivable that the District Court could find that Noriega's attorney-client privilege would not prohibit the government's recording of Noriega's telephone conversations with his defense attorneys because there would not exist a reasonable expectation of privacy. However, this is a matter to be addressed by the District Court. If Noriega did intend his conversations with his defense attorneys to be confidential, after signing a release, the District Court would be required to ascertain whether this expectation was reasonable.

It is a "bedrock principle that the attorney-client privilege is the client's and his alone. If the client wishes to waive it, the attorney may not assert it, either for the client's or his own benefit." *United States v. Juarez*, 573 F.2d 267, 276 (5th Cir.), *cert. denied*, 439 U.S. 915 (1978). Thus, it is also conceivable that the District Court, after examining the telephone usage release signed by Noriega, may determine that Noriega did waive his attorney-client privilege as to the recorded conversations. If this is the case, the privilege may not be assertable. Again, this is a matter for determination by the District Court.

Whether or not the telephonic communications between Noriega and his defense counsel are privileged, while not necessarily determinative of whether such communications should be publically broadcast, would be relevant to the Dis-

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[10] It is not unusual or unreasonable to condition the use of telephones by penal inmates on monitoring of the telephone calls by the authorities charged with the responsibility of maintaining the security of the penal facility. *See, e.g., Feeley v. Sampson*, 570 F.2d 364, 373-374 (1st Cir. 1978) (suggesting that striking an appropriate balance between the interests of prison authorities and prisoners could be achieved by conditioning prisoners' access to telephones on their recognition that prison guards have authority to monitor telephone conversations). Moreover, possession of such communications by one element of the government does not necessarily implicate another element.

trict Court's assessment of potential harm to Noriega's right to a fair trial.

III. CONCLUSION

It is manifest that the District Court has been presented a delicate, difficult and important task requiring him to balance between the press and public's First Amendment rights, the Sixth Amendment rights of the accused, and the public's expectation that the trial will be fair and held before an impartial jury. However, CNN has shackled the District Court by refusing that court's reasonable request to review the audio tapes it has in its possession and which CNN desires to broadcast. While appealing to our nation's judicial system for relief, CNN is at the same time defiant of that system's reasonable directions.

The foregoing analysis compels the conclusion that the First Amendment interests of the press and the public will be best served by immediate production of the tapes held by CNN so that the District Court can conduct the difficult balancing of constitutional rights required under these circumstances; an obligation which the District Court is required to discharge. After review of such tapes, it is entirely conceivable that the District Court may determine that the disclosure of only portions of such tapes would threaten the Sixth Amendment rights of Noriega. Under such circumstances the accused's Sixth Amendment right to a fair trial is properly balanced against the First Amendment rights of the press and public. At this juncture, however, we are required to speculate as a result of CNN's refusal to produce the tape recordings.

No litigant can continue to violate a district court's order and attempt to have that district court's order reviewed at the same time.

Accordingly, for the reasons stated above, we DENY the initial petition for mandamus relief, CNN's request for entry of a stay of the District Court's TRO and its request for oral argument (Case No. 90-5927) and DENY CNN's subsequent petition (Case No. 90-5932).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5926

UNITED STATES OF AMERICA,

Plaintiff,

versus

MANUEL ANTONIO NORIEGA,

Defendant-Appellee,

CABLE NEWS NETWORK, INC. and
TURNER BROADCASTING SYSTEM, INC.,

Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: JOHNSON, HATCHETT and BIRCH, Circuit Judges.

BY THE COURT:

Appellants' appeal from the oral order of November 8, 1990, granting defendant-appellee Noriega's motion for a temporary restraining order prohibiting CNN from telecasting tape recordings in its possession is DISMISSED for lack of jurisdiction. *See* Fed.R.App.P. 4(6).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-0079-Cr-Hoeveler

UNITED STATES OF AMERICA,

Plaintiff,

v.

MANUEL NORIEGA, ET AL.,

Defendants.

ORDER

THIS CAUSE IS before the court on Defendant Manuel Noriega's motion to enjoin Cable News Network, Inc. and its corporate parent, Turner Broadcasting System, Inc. (collectively "CNN") from broadcasting or otherwise disseminating contents of tape records containing privileged telephone communications between Noriega and his lawyers and staff.

DISCUSSION

This issue at bar presents the court with the unfortunate and difficult task of resolving a conflict between two fundamental constitutional rights: the sacrosanct First Amendment right of the press to be free from any prior restraint on speech, and the fundamental right of an accused to a fair trial.

At the outset, the court notes that the issue it confronts is unprecedented. The court is aware of no case, and none has been presented to it, in which a member of the press sought to broadcast an otherwise privileged attorney-client communication. Past cases dealing with the conflict between the First Amendment and the right to a fair trial have concerned

damaging information which, if made known, could hamper the selection of a fair and impartial jury. *See Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1984). Not only does the court now potentially face that very same issue, but it encounters the novel circumstance where the speech, if published, could — against all strictures of due process and fairness — reveal to the prosecution the defendant's trial strategy and protected confidences. The cases cited by the parties discussing the doctrine of prior restraint are, therefore, of somewhat limited precedential value to the facts of this case.

Defendant characterizes the issue as the violation of the attorney-client privilege. To be sure, there is no question that such a violation has occurred. CNN concedes that the tapes contain communication between Noriega and his lawyers or staff, and there is no indication that the attorney-client privilege was waived. It further appears that the conversations were recorded by a third-party, and that the tapes of these conversations were delivered into CNN's possession either by that same party or another third-party. Nonetheless, it is the court's opinion that the issue at stake is more properly framed as the defendant's right to a fair trial.

The attorney-client privilege is not per se a constitutional right; however, the privilege takes on a constitutional aspect when, as here, it serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication and disclosure by the defendant to his attorney. That purpose, however, has already been frustrated by the very fact of invasion. An injunction prohibiting CNN from broadcasting the tapes would go nowhere toward preventing the harm which has already occurred — that harm being Noriega's understandable reluctance to freely discuss his case with his lawyers in light of what has occurred. In other words, the uninhibited communication which the attorney-

client privilege protects was impeded at the very moment Noriega learned his confidential conversations were being monitored, and given this, a restraint on the broadcast of those conversations would be symbolic and prophylactic as far as this aspect of the attorney-client privilege is concerned.

A secondary purpose behind the attorney-client privilege, and the prohibition of its violation, is to prevent the disclosure of information damaging to the defendant's case — information which, though damaging, is privileged. In this sense, the issue is really one of the right to a fair trial rather than the attorney-client privilege per se. The court therefore sees this case as a conflict between Noriega's right to a fair trial and the First Amendment prohibition against prior restraints.

The right of the press to be free of prior restraints on speech is, of course, at the very core of the First Amendment. A prior restraint is presumptively unconstitutional, with the movant bearing the "heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). "In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on speech." *In re Providence Journal Co.,* 820 F.2d 1342, 1348 (1st Cir. 1986), *modified,* 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed,* 485 U.S. 693 (1988). This does not mean, however, that there is no situation in which a prior restraint on the press is justified. Among the very narrow range of cases which may justify a restraint are those involving a criminal defendant's right to a fair trial. *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976); *In re Providence Journal Co.,* 820 F.2d at 1350. *Nebraska Press Association* involved the problem of excessive pretrial publicity and the right to a fair and impartial jury. In that case, the Supreme Court established the test that must be met before prior

restraint is justified where the restraint is based on the need to prevent such prejudicial publicity:

> 1) the nature and the extent of pretrial publicity must impair the right to a fair trial;
>
> 2) there exist no less restrictive alternative measures which would mitigate the effects of the publicity; and
>
> 3) a prior restraint would effectively prevent the harm.

Nebraska Press Association, 427 U.S. at 562-68.

The Supreme Court struck down the restraints in *Nebraska Press Association* on the ground that alternative means existed to ensure a fair jury — for example, change of venue, careful voir dire, and a postponement of the trial.

In this case, however, another distinct aspect of the right to a fair trial is at issue, and that is the right of the defendant not to have his trial strategy and tactics disclosed to the prosecution. The court recognizes, as stated earlier, that the movant bears a heavy burden to prove that a prior restraint is justified, and that a prior restraint can issue only where the danger of disclosure is clear, immediate, and irreparable. On this point, defense counsel has already heard certain portions of CNN's tapes, and has stated to the court that the portions he heard involved discussion of witnesses, defense investigations, evidence, and trial strategy at the core of Noriega's defense. It is further noted that defense counsel's burden on the issue is significantly hampered by the fact that his ability to fully elaborate upon the nature of the harm is limited given the presence of CNN, the prosecution, and indeed, the undersigned, at the hearing. Full disclosure of the extent of the harm — which would involve discussion of his defense and trial strategy — would bring about the very problem he seeks to avoid.

As is set forth in the cases, and in particular, *Nebraska Press Association*, the determination of when prior restraint is justified where it conflicts with the right of fair trial must rest upon factual findings based on the contents of the speech at issue. The three-prong test in *Nebraska Press Association*, addressed to prejudicial pretrial publicity, applies here as well where the disclosure of the defense and confidential trial strategy is at stake. Thus, the court would have to determine, based upon the content of the speech, whether the nature and extent of the disclosure would impair the right to a fair trial, whether any less drastic means exists which would mitigate the effects of the disclosure, and whether a prior restraint would effectively prevent the harm. Unfortunately, the contents of CNN's tapes are not before the court, and therefore it is impossible to determine, at this stage, the precise extent to which Noriega's right to a fair trial would be hampered by disclosure. What is known at this point is that at least some of the tapes contain discussions of witnesses, evidence, and certain other aspects of Noriega's defense. Perhaps this alone is enough to sustain an interim injunction during the course of the trial. But given the heavy constitutional presumption against prior restraints, it is the court's opinion that further inquiry is required. Accordingly, it is hereby

ORDERED and ADJUDGED that the temporary injunction imposed on CNN at the hearing this morning is continued until such time as the court can review the contents of the tape recordings in CNN's possession. In order to avert a situation which would require recusal of the undersigned on the basis of exposure to privileged attorney client communications, review of the tapes at issue will be undertaken by the Honorable William C. Turnoff, who will thereupon determine whether anything contained in the recordings presents a clear, immediate, and irreparable danger to defendant's right to a fair trial. In order to accomplish this necessary task CNN will be re-

quired to produce copies of the tapes currently in its possession.

DONE and ORDERED in chambers in Miami, Florida this 8th day of November 1990.

UNITED STATES DISTRICT JUDGE

Copies furnished to
Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-0079-Cr-Hoeveler

UNITED STATES OF AMERICA,

Plaintiff,

v.

MANUEL NORIEGA, et al.,

Defendants.

SUPPLEMENTAL ORDER

THIS CAUSE IS before the court upon the Motion of Defendant Manuel Noriega for an injunction restraining CNN from broadcasting the contents of tape recordings containing privileged attorney-client communications.

At 8:30 a.m. on November 8, 1990, the court convened an emergency hearing on defendant's motion. At the conclusion of the hearing, the court ordered CNN to refrain from broadcasting the tapes until it heard from the court later in the day so as to provide the court with time to deliberate on the novel issues raised by the motion. The court subsequently entered an Order continuing its temporary restraint until such time as a federal magistrate could review the contents of the tape recordings and determine whether defendant Noriega's right to a fair trial would be jeopardized by publication of the contents of the attorney-client communications. The court's temporary restraining order and Order continuing the temporary restraint did not and do not apply to conversations which do not contain privileged attorney-client communications.

In light of CNN's emergency appeal of the court's Order to the Eleventh Circuit Court of Appeals, the court enters this Supplemental Order to further clarify and elaborate on the court's decision.

The initial question presented by the case is whether the press can constitutionally be prohibited from publishing privileged attorney-client communications which have not been waived, regardless of how the communications were obtained by the press and regardless of the particular content of the attorney-client communications. Assuming, however, that there are at least some circumstances in which the First Amendment prohibits the prior restraint of even privileged attorney-client communication, the Supreme Court's pronouncements on the doctrine of prior restraint suggest that a factual inquiry is required. In *Nebraska Press Association v. Stuart,* the Supreme Court established that the test for determining whether a prior restraint can issue where the right to a fair trial is at stake requires conclusions as to 1) whether the right to a fair trial would be impaired, 2) whether less restrictive alternative measures short of prior restraint are sufficient, and 3) whether a prior restraint would effectively prevent the harm. 427 U.S. 539, 562-68 (1976). As was stated in the court's Order, the contents of the tape recordings were not before the court. Thus, the court was in effect being asked to make a factual determination without being allowed to review the facts. On this point, it is important to note that CNN is in possession of the tapes, and has resisted turning them over to the court for review. It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court — that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession. In re-

sponse to the portion of the court's Order requiring production of the tapes to this court for the Magistrate's review, CNN argues that the court should compel production of the tapes from the Government before looking to CNN.[1] Requiring Governmental production would require the Magistrate to review all of the recorded phone calls between Noriega and his attorneys — potentially hundreds of them dating back to January 1990 — in search of damaging attorney-client communications. The more efficient alternative would be for CNN to provide the specific conversations in its possession for expedited review. Obviously, CNN prefers delay to production, indicating that this court's temporary restraint is not viewed even by CNN as a serious infringement of its First Amendment rights.

The court herein wishes to emphasize that its Order was not a decision on the merits of the request for injunction, but rather a temporary restraint until such time as the Magistrate could review the tapes and permit this court to make a determination based on the merits. Of course, usually a decision to impose a temporary restraint on speech can be viewed as a decision on the merits of the request, since even a temporary restraint can issue only after the court is convinced that disclosure would clearly and immediately harm the particular right at stake. *Nebraska Press Association*, 427 U.S. 559 ("the burden on the [party seeking the restraint] is not reduced by the temporary nature of the restraint"); *CBS v.*

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[1] The court notes that a review of the tapes in the Government's possession would not necessarily allow the court to determine whether or not disclosure of CNN's tapes would impair Noriega's right to a fair trial. It is entirely possible that CNN is in possession of communications between Noriega and his lawyers and staff which the Government did not record, since it appears that the Government did not tape all of Noriega's attorney-client conversations. The communications in CNN's possession might have been recorded from a location outside of the prison where Noriega is incarcerated.

United States District Court, 729 F.2d 1174, 1177 (9th Cir. 1983). But the unique nature of the problem facing this court, unlike other courts which have faced this issue, is that no such determination was nor is possible without knowing the precise contents of the speech sought to be restrained, here the privileged attorney-client communications in CNN's possession. *See e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Association*, 427 U.S. 539 (1976); *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1983); *In re Providence Journal Co.* 820 F.2d 1342 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed* 485 U.S. 693 (1988).

CONCLUSION

I cannot conceive that the law of prior restraint is so sacrosanct and so encompassing that there can be no fact situation which would justify enjoining publication of communications between attorney and client regardless of the nature of the communications or the method by which the information was obtained. If the invasion or the propagation of the invasion is not, as stated, in and of itself legally sufficient to justify enjoining, certainly it would appear necessary to look to the surrounding facts to determine the nature and extent of potential damage before dissemination.

We are here concerned with one of the most fundamental protections afforded an accused. Before final determination on the merits where such a vital constitutional right is at stake, it is only fundamentally fair that both the court and the parties explore both the facts and the law surrounding the issues. Accordingly it is hereby

ORDERED and ADJUDGED that the court's Order of November 8, 1990 on this matter is hereby supplemented; it is further ORDERED and ADJUDGED that the temporary re-

straining order will remain in effect for up to ten (10) days or such lesser time as needed by this court to review the recorded communications and reach a decision on the merits.

DONE and ORDERED in chambers in Miami, Florida this 9th day of November 1990.

WILLIAM H. HOEVELER
UNITED STATES DISTRICT
JUDGE

Copies furnished to
Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 88-79-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

COMES NOW the Defendant, GENERAL MANUEL ANTONIO NORIEGA, by and through his undersigned attorney and hereby files this, his Motion For Injunction.

On Tuesday evening, November 6, 1990, Mr. John Camp, Marlene Fernandez and Kathy Slobugin of CNN, Turner Broadcasting Systems, Inc., came to this attorney's office. They advised that they were in possession of seven (7) tape recordings made by the Department of Justice at the Miami Metropolitan Correctional Center. They further advised that these tape recordings were recordings of telephone conversations made by General Noriega. They played a portion of one (1) tape recording for me; it was clearly a tape recording of an attorney/client privileged communication between General Noriega, Cristina Machin, of my office, interpreting, and my legal assistant, James Hawkins. This conversation involved trial strategy and investigation of the pending criminal charges against General Noriega.

Both this attorney and Cristina Machin listened to the tape recording, and have no doubt, whatsoever, that this was an attorney/client privileged communication that should never have been recorded by anyone whatsoever, let alone to be

released on national television. Communications between a lawyer and a client are sacred and this most horrendous constitutional violation by the government, should not be allowed to continue to the point of public broadcast. CNN advised that they intend to air a show about the wiretapping of General Noriega's telephone, by the Justice Department, on Thursday evening, November 8th, 1990 at 6:00 p.m.

It is not the intention of the Defendant, General Manuel Antonio Noriega, to prohibit freedom of press, or deny CNN their First Amendment rights. Conversely, it is not General Noriega's intent, nor this attorney's intent to waive the attorney/client privilege established between them.

More specifically, the objection made is not to CNN's right to broadcast a story, but specifically their right to play a particular attorney/client privileged communication. No objection is made, whatsoever, to CNN's airing of any news story, whatsoever, and more particularly no objection is made to this particular news story, but only to the playing of a constitutionally protected communication between an attorney and his client.

WHEREFORE it is most respectfully requested that this Honorable Court will grant this emergency injunction prohibiting CNN, Turner Broadcasting Systems, Inc., from broadcasting any tape recording of any communication between General Manuel Antonio Noriega and any of his lawyers or his staff.

Respectfully submitted,

FRANK A. RUBINO, ESQUIRE
2601 So. Bayshore Drive
Suite 1400
Coconut Grove, FL 33133
(305) 858-5300
Fla. Bar No: 209171

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion For Injunction was faxed to Myles Malman, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130, and CNN, Turner Broadcasting Systems, Inc., Miami, Florida and Atlanta, Georgia, this the 7th day of November, 1990.

_____

FRANK A. RUBINO, ESQUIRE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-79-Cr-Hoeveler

NOTICE OF HEARING
EMERGENCY INJUNCTION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL NORIEGA,

Defendant.

Please take Notice that the Honorable William Hoeveler will hold a hearing on General Manuel Antonio Noriega's Motion for Injunction, to prohibit CNN, Turner Broadcasting Network from broadcasting tape recordings of confidential attorney-client privileged telephone conversations which have been illegally recorded by the United States Justice Department.

This hearing shall take place at the United States District Court for the Southern District of Florida, 301 N. Miami

Avenue, 9th Floor, Miami, Florida on Thursday November 8, 1990 at 8:30 a.m.

Respectfully submitted,

FRANK A. RUBINO, ESQUIRE
Attorney for the Defendant.
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(305) 858-5300
Fla. Bar No. 209171

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Hearing was faxed to CNN, Miami, Florida and Atlanta, Georgia this the 7th day of November 1990.

FRANK A. RUBINO, ESQUIRE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER: 88-79-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

NOTICE OF APPEAL

Turner Broadcasting Systems and Cable News Network, Inc. hereby appeals to the United States Court of Appeals for the Eleventh Circuit from this Court's oral Order granting a Temporary Restraining Order entered in this action on November 8, 1990.

Respectfully submitted,

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Stuart F. Pierson
DAVIS WRIGHT TREMAINE
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Washington, D.C. 20036

Steven W. Korn
Vice President and General Counsel
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One CNN Center
Atlanta, Georgia
Attorneys for Turner Broadcasting System, Inc. and Cable News Network

and

Terry Bienstock
Frates Bienstock & Sheehe
Suite 3160
Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Notice of Appeal was served by hand this 8th day of November, 1990 on MYLES MALMAN, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130 and FRANK A. RUBINO, 1400 General Development Center, 2600 South Bayshore Drive, Coconut Grove, Florida 33133.

_____

ATTORNEY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

CNN NOTICE OF APPEAL

Under the Federal Rules of Appellate Procedure, the rules of this Court and particularly this Court's Rule 27-1(b), Cable News Network, Inc., and its corporate parent, Turner Broadcasting System, Inc., (collectively "CNN"), herewith appeal from an order entered November 8, 1990 by the United States District Court for the Southern District of Florida, prohibiting CNN from telecasting news information until that court decides whether to extend its prior restraint further in time.

CNN proceeds on this appeal as an affected party subject to the District Court's order, and it seeks emergency, expedited treatment in this Court to review immediately and to vacate forthwith that order as a violation of the First Amendment to the United States Constitution.

Respectfully submitted this 8th day of November, 1990.

Dan M. Waggoner

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. ~

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

EMERGENCY MOTION OF APPELLANT CNN

Cable News Network, Inc., and its corporate parent, Turner Broadcasting System, Inc., (collectively "CNN"), herewith make an emergency motion to this Court for immediate consideration and vacation of an order entered November 8, 1990 by the United States District Court for the Southern District of Florida in the case of the United States v. Noriega, USDC No. 88-79-CR-HOEVELER. As grounds for this motion, CNN states:

1. CNN provides worldwide, 24-hour news and information by telecast.

2. As it now stands, the District Court has ordered that CNN is prohibited from telecasting tape recordings in its possession, the content of which has been publicly identified by Noriega's counsel as confidential conversations with his defense team concerning strategy and investigation of his defense. Noriega's counsel has asserted

that the government has made the tape recordings in violation of his attorney-client privilege.

3. The District Court's order was entered upon the motion of defendant Noriega to restrain CNN from telecasting clearly newsworthy information concerning the government's conduct in that criminal case.

4. Under the First Amendment to the United States Constitution, any motion for prior restraint of a news report faces a very heavy burden and a heavy presumption against its constitutional validity.

5. That heavy burden was not met by any of the parties or the court below.

6. Therefore, the order was an unconstitutional prior restraint which should be immediately considered and vacated by this Court.

7. Upon the foregoing, and as more fully set forth in the attached Memorandum and Support, there is a high likelihood that appellant will prevail on the merits; irreparable injury has already occurred and will continue if relief is not provided forthwith; any alleged harm to other parties cannot outweigh the constitutional rights at stake; and the public interest will be served by immediately eliminating this infringement on constitutionally protected rights.

This motion is based on all materials of record in the District Court, on the attached Memorandum in Support, and on all other papers attached hereto.

WHEREFORE, CNN prays for this Court's immediate consideration and forthwith order vacating the order appealed from and all similar orders.

Respectfully submitted this 8th day of November, 1990.

Dan M. Waggoner

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant.

CASE NUMBER: 88-79-CR-HOEVELER

TURNER BROADCASTING SYSTEM, INC. AND CABLE NEWS NETWORK, INC.'S MOTION FOR STAY PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

Turner Broadcasting System, Inc. and Cable News Network (collectively ("CNN") prays for the entry of a stay pending emergency appeal of its preliminary injunction prohibiting CNN from broadcasting any portion of the tapes it has obtained containing conversations between Manuel Noriega and his attorneys. This Motion is made pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. In support of his Motion, CNN shows the Court as follows:

1. Rule 62(c) of the Federal Rules of Civil Procedure provides as follows:

> **(c) Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal. . . .

This Court should, in its discretion, stay the operation of its preliminary injunction for the reasons set forth below.

2. This Court's Order is a prior restraint on the Press and is presumptively unconstitutional. *Pittsburgh Press Company v. Pittsburgh Committee on Human Relations*, 413 U.S. 376 (1973); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). Continuation of this Order in effect during the appellate process will cause irreparable injury to CNN by denying it the freedom of the press guaranteed by the first Amendment to the United States Constitution.

WHEREFORE, CNN prays for a stay of this Court's Order dated November 8, 1990, pending emergency appeal of this action.

Respectfully submitted,

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By: TERRY S. BIENSTOCK
Florida Bar Number 259160

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Stay Pending Appeal and Incorporated Memorandum of Law was served by hand this 8th day of November, 1990 on MYLES MALMAN, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130 and FRANK A. RUBINO, 1400 General Development Center, 2600 South Bayshore Drive, Coconut Grove, Florida 33133.

_____

ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER: 88-79-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

NOTICE OF APPEAL

Turner Broadcasting Systems and Cable News Network, Inc. hereby appeals to the United States Court of Appeals for the Eleventh Circuit from this Court's written Order granting a Temporary Restraining Order entered in this action on November 8, 1990, and from the Supplemental Order modifying same entered on November 9, 1990.

Respectfully submitted,

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By: TERRY S. BIENSTOCK
Florida Bar Number 259160

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Notice of Appeal was served by hand this 9th day of November, 1990 on MYLES MALMAN, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130 and FRANK A. RUBINO, 1400 General Development Center, 2600 South Bayshore Drive, Coconut Grove, Florida 33133.

ATTORNEY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et. al,

Emergency Appellants.

SECOND EMERGENCY MOTION OF APPELLANT CNN

Cable News Network, Inc., and its corporate parent, Turner Broadcasting System, Inc., (collectively "CNN"), herewith make an emergency motion to this Court for immediate consideration and vacation of a second order entered November 8, 1990 by the United States District Court for the Southern District of Florida in the case of the *United States v. Noriega*, USDC No. 88-79-CR-HOEVELER. This emergency motion relates to an order issued by the District Court during the evening of November 8, 1990 and a supplemental order issued on November 9, 1990. The issuance of such order occurred subsequent to CNN's filing of an emergency motion concerning a previous order entered by the District Court on the morning of November 8, 1990. As grounds for this motion, CNN states:

1. CNN provides worldwide, 24-hour news and information by telecast.

2. As it now stands, the District Court has ordered that CNN is prohibited from telecasting tape recordings

in its possession, the content of which has been publicly identified by Noriega's counsel as confidential conversations with his defense team concerning strategy and investigation of his defense. Noriega's counsel has asserted that the government has made the tape recordings in violation of his attorney-client privilege.

3. The District Court's order was entered upon the motion of defendant Noriega to restrain CNN from telecasting clearly newsworthy information concerning the government's conduct in that criminal case.

4. Under the First Amendment to the United States Constitution, any motion for prior restraint of a news report faces a very heavy burden and a heavy presumption against its constitutional validity.

5. That heavy burden was not met by any of the parties or the court below.

6. Therefore, the order was an unconstitutional prior restraint which should be immediately considered and vacated by this Court.

7. Upon the foregoing, and as more fully set forth in the attached Memorandum and Support, there is a high likelihood that appellant will prevail on the merits; irreparable injury has already occurred and will continue if relief is not provided forthwith; any alleged harm to other parties cannot outweigh the constitutional rights at stake; and the public interest will be served by immediately eliminating this infringement on constitutionally protected rights.

This motion is based on all materials of record in the District Court, on the attached Memorandum in Support, and on all other papers attached hereto.

WHEREFORE, CNN prays for this Court's immediate consideration and forthwith order vacating the order appealed from and all similar orders.

Respectfully submitted this 8th day of November, 1990.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant,

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

CNN'S MOTION FOR A STAY PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 8(a), Cable News Network, Inc., and its corporate parent Turner Broadcasting System, Inc. (collectively "CNN") hereby respectfully request a stay of an order issued November 8, 1990 by the United States District Court for the Southern District of Florida in the case of *United States v. America v. Manuel A. Noriega*, District Court No. 88-79-CR-HOEVELER.

STATEMENT

The United States District Court for the Southern District of Florida, Judge Hoeveler presiding, in a series of orders has enjoined CNN temporarily from telecasting certain audio recordings obtained by CNN. The recordings allegedly contain conversations between Defendant Noriega and his defense team.

The District Court's orders, by their terms, remain in effect until such time as the District Court issues a further

final ruling on a motion by Noriega's defense attorney that CNN be enjoined permanently from telecasting such recordings. A further ruling will not issue, however, until the Court below gathers further information about the content of all tapes potentially at issue in CNN's story, a process that may last for an extended period. At this time, the District Court only has ordered the U.S. Bureau of Prisons ("B.O.P.") to identify the number of tapes to Magistrate William Turnoff, apparently for his possible, eventual review. While the B.O.P. has indicated that it will attempt to state the number of tapes by Friday, November 9, 1990, it is entirely possible that the B.O.P.'s identification, and possible eventual review and production will take much longer. In any event, CNN is entitled to a stay of the District Court's order pending appeal, due to the nature of the issues at stake.

To be entitled to a stay of the District Court's order, CNN must establish (i) a reasonable probability of success on the merits, (ii) a substantial threat that it will suffer irreparable injury if the injunction is not granted, (iii) that the threatened injury outweighs the threatened harm any injunction or restraining order may cause the opposing party; and (iv) that the entry of injunctive relief will not disserve the public interest. *See, e.g.* FRCP 8; *Callaway v. Block*, 763 F.2d 1283, 1287 (11th Cir. 1985). Because: (i) the District Court's order is unconstitutional; (ii) CNN has been and will continue to be irreparably injured as a result of the effects of such order; (iii) minimal harm to Noriega will result from a stay of the order; and (iv) the public interest will be served by a stay of the order, CNN's motion for a stay of the order should be granted.

A request for a stay of the order giving rise to this motion has been made both orally and in writing to and denied by the District Court which issued the order.

CITATION OF AUTHORITY

All applicable authority demonstrates that this Court should grant CNN's motion for a stay of the District Court's order, pending appeal.

1. *CNN has a probability of success on the merits.*

The merits of CNN's case are set forth in full in CNN's Memorandum In Support Of Its Emergency Motion, previously served on the Court on November 8, 1990. The United States Supreme Court and Courts of Appeal have uniformly rejected prior restraints against news telecasts as unconstitutional, a principle recognized but erroneously ignored by the District Court. (See, *e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Pittsburgh Press Co. v. Pittburgh Comm. on Human Relations*, 413 U.S. 376 (1973)). Because such restraints are presumptively unconstitutional and because the District Court's order is transparently invalid under the First Amendment, CNN has demonstrated a clear probability of success on the merits.

2. *CNN will suffer irreparable injury if this Court does not stay the lower Court's order.*

A transparently invalid order prohibiting CNN from exercising its rights under the First Amendment is *per se* evidence of irreparable damage. *See Nebraska Press Assoc. v. Stuart*, 472 U.S. 539, 565-566 (1976); *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed* 485 U.S. 693 (1988) *In Re C.B.S., Inc.* 570 F.Supp. 578, 585 ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). By virtue of the Court's order, CNN has been restrained and is being restrained from disseminating compelling and newsworthy information pertaining to its discovery of tape recordings of conversations between

Noriega and his attorneys. CNN will continue to be irreparably damaged absent this Court's consideration and vacation of the lower Court's order.

3. *No undue harm will result to Noriega as a result of this Court's issuance of a stay pending appeal.*

Any damage to Noriega's case arising as a result of tape recordings containing conversations between Noriega and his defense team has already occurred or can be addressed through the less intrusive alternative of restraining the prosecution team from examining any such conversations. The harm to Noriega (and, concurrent therewith, the potential violation of his attorney-client privilege) occurred by virtue of the creation, existence and possible review by the government of the tape recordings themselves — not CNN's potential telecast thereof. The District Court's order prohibiting CNN from further publicizing the contents of the tape is moot, because the information it seeks to restrain already has been widely publicized, including by Noriega's own counsel. Accordingly, Noriega will not be harmed if this Court stays the lower Court's order.

4. *The public interest will be served by this Court's grant of CNN's application for a stay pending appeal.*

"[T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct." *Nebraska Press*, 427 U.S. 539, 557-559 (1976). Here, CNN is fulfilling its primary role under the First Amendment to report on criminal proceedings and government action. The public interest will be served by this Court's issuance of a stay of the District Court's order pending appeal, protecting CNN's constitutional rights under the First Amendment and the public interest in receipt of news.

CONCLUSION

For the reasons and upon the authorities cited above, CNN respectfully requests that its notice for a stay pending appeal be granted. CNN further requests that the bond for the stay be set at $0, due to the nature of the interests as stake and the fact that no dollar value can be placed upon same.

Respectfully submitted this eighth day of November 1990.

Daniel M. Waggoner

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

APPELLANT CNN'S APPLICATION FOR LEAVE TO PRESENT A VIDEOCASSETTE TAPE AT ORAL ARGUMENT ON ITS EMERGENCY MOTION IN THE ABOVE-CAPTIONED MATTER

Cable News Network, Inc., and its corporate parent Turner Broadcasting System, Inc. (collectively "CNN") have moved this Court to consider on an emergency basis CNN's request that this Court consider and vacate an order entered November 8 and 9, 1990, by the United States District Court for the Southern District of Florida in the case of United States v. Noriega, USDC No. 88-79-CR-HOEVELER, and issue writs of mandamus and prohibition restraining the District Court from conducting a hearing at 3:00 p.m. on November 10, 1990.

At 6:30 p.m. on November 9, 1990, CNN telecast a story on the Noriega tapes, and shortly thereafter, the Honorable William Hoeveler made certain statements to an employee for

CNN concerning the earlier telecast and these proceedings. Those statements may well have bearing on CNN's applications to this Court.

Therefore, CNN respectfully requests that it be granted leave to file and exhibit the videocassette tape to the Court.

DATED this 10th day of November, 1990.

Dan M. Waggoner

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Steven W. Korn
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Telephone: (305) 358-7447

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the attached notice of appeal and emergency motion on counsel for the United States and defendant by telefax, this 10th day of November, 1990.

Daniel M. Waggoner

NORIEGA TAPES

NOVEMBER 8, 1990

THE UNITED STATES GOVERNMENT HAS BEEN CLANDESTINELY TAPING ITS PRIME PRISONER GENERAL MANUEL NORIEGA. CNN SPECIAL ASSIGNMENTS JOHN CAMP HAS THE STORY.

Montage of Noriega with supporters, intercut with invasion, ending with Noriega capture

CAMP VO

December 1989, the U-S invades Panama to capture General Manuel Antonio Noriega. He is portrayed as a narcoterrorist, a man who plundered his own country and made millions in the transportation of cocaine into the United States. In January he is brought to the U-S to stand trial on drug conspiracy charges.

BUSH SOT

WE ARE COMMITTED TO A FAIR TRIAL AND TO PROVIDING ALL THE PROTECTIONS GUARANTEED BY THE U-S CONSTITUTION AND LAWS.

CAMP OC

BUT CNN HAS OBTAINED MATERIAL INCLUDING TAPE RECORDINGS THAT RAISE SERIOUS QUESTIONS ABOUT PROCEDURES IN THE CASE AND MAY EVEN RAISE A QUESTION ABOUT WHETHER GENERAL NORIEGA WILL RECEIVE A FAIR TRIAL.

ACCORDING TO INFORMATION RECEIVED BY CNN THE TAPES ARE IN THE POSSESSION OF THE FEDERAL GOVERNMENT.

Prison Exterior

CAMP VO

Today, General Noriega is held under tight security in the Miami correctional center.

His main link with the outside world, the telephone.

AUDIO
FROM PRISON GUARD

This previously recorded outgoing telephone call was placed from the correctional center in Miami, Florida on March 16th, 1990 by inmate Manuel Antonio Noriega, serial number 38699079.

CAMP VO

As a matter of course federal prisoners like Noriega are asked to sign waivers allowing their conversations to be monitored or tape recorded by prison officials.

CNN TELEMUNDO correspondent Marlene Fernandes has obtained excerpts of tapes said to contain those conversations.

Noriega talks about reorganizing his power base in Panama as in this conversation with a former Panamanian official in hiding at the time.

AUDIO

FROM NORIEGA TAPES: Tape 1, 5:31:00

Hi Lucho.

Hi boss. How are you? I was worried because I didn't hear from you for so long.

I thought you had already gone out of the country.

No, your friends have me trapped here.

: But you are working hard, right?

: Enormously.

: Uhmm, because it is important to keep the morale of our people high.

STILL of Bush with Noriega

CAMP VO

Sometimes General Noriega appears to conceal the content of his discussions as in this message to the Cuban embassy in Panama about George Bush.

Noriega in prison

AUDIO

FROM NORIEGA TAPES:
Tape 2, 5:39:28

CAMP VO

According to CNN's information Noriega appears to be using a crude code to say: We are going to return the ball to the court of the CIA and Bush in our legal strategy.

In other tapes Noriega talks about transferring sums of money, political moves in Panama and concerns about prospective witnesses against him.

CAMP VO

Although the government may be authorized to tape conversations of a federal prisoner, there are certain conversations that generally are unlawful to record — those with the prisoner's attorney.

GILLERS SOT

THE AREA THAT IS INVIOLATE IS THE COMMUNICATIONS BETWEEN THE DEFENDANT AND HIS OR HER LAWYER OR ANY MEMBER OF THE DEFENSE TEAM.

CAMP VO

New York University professor Stephen Gillers is an expert in legal ethics.

GILLERS SOT

A PERSON IN JAIL AWAITING TRIAL HAS A RIGHT TO CONSULT WITH COUNSEL AND REPRESENTATIVES, AND THAT CONSULTATION HAS TO BE TOTALLY SECRET.

Tape 1, second bite

CAMP VO

But CNN has a tape which appears to be excerpts of a conversation between Noriega and his defense team. CNN has also been shown evidence that there are other such recordings.

SONNETT SOT

I AM OUTRAGED THAT THE GOVERNMENT WOULD RECORD THOSE KINDS OF CONVERSATIONS.

CAMP VO

Neal Sonnett is past president of the National Association of Criminal Defense Lawyers and a former Noriega attorney.

SONNETT SOT

I THINK IT'S CLEAR GOVERNMENT MISCONDUCT. IT FLIES IN THE FACE OF EVERYTHING THAT'S SACRED ABOUT THE ATTORNEY-CLIENT PRIVILEGE. AND THE ATTORNEY-CLIENT RELATIONSHIP.

GILLERS SOT

IF IT'S BEEN GOING ON FOR A LONG PERIOD OF TIME SO THAT INADVERTANT OR ACCIDENT IS NO LONGER A REASONABLE INFERENCE, IF THE GOVERNMENT SAT DOWN AND SAID, HEY . . . WHAT A FIND. LET'S TAPE THIS GUY'S CONVERSATIONS WITH HIS LAWYERS. IT WILL GIVE US A BETTER CHANCE TO WIN IN COURT, IF THAT'S WHAT THE GOVERNMENT DID THEN IT RISKS LOSING THE CASE. IT RISKS HAVING THE INDICTMENT DISMISSED FOR PROSECUTORIAL MISCONDUCT.

TAPE 1, BITE 4

Justice department exterior

CAMP VO

CNN has made repeated efforts to get a response from the Department of Justice about the tapes, both in Miami and in Washington but it has refused to comment.

Someone who would comment is Richard Gregorie, a former assistant U-S attorney who spearheaded the investigation of Noriega that lead to his indictment.

CAMP SOT

CAN YOU IMAGINE ANY CIRCUMSTANCES UNDER WHICH THERE WOULD BE RECORDINGS OF WHAT COULD PERHAPS BE CLASSIFIED AS ATTORNEY-CLIENT PRIVILEGE?

Tape 4, 1:59

GREGORIE SOT

THIS CASE CERTAINLY WAS A LARGE PART OF MY LIFE FOR A COUPLE OF YEARS AND SOMETHING I FEEL VERY STRONGLY ABOUT. I WOULD BE VERY CONCERNED ABOUT ENDANGERING THE CASE BY RECORDING CONVERSATIONS THAT MIGHT INVOLVE NORIEGA'S LAWYER.

Tape 4, 2:14

HOWEVER, IF THE JUSTICE DEPARTMENT HAD REASON TO BELIEVE THERE WAS ANOTHER CRIME BEING COMMITTED, THAT IS NORIEGA WAS PLANNING SOME OTHER CRIMINAL ACT WHILE HE WAS IN JAIL, THEN THEY WOULD HAVE AUTHORITY TO INVESTIGATE THAT ONGOING CRIMINAL ACT.

Tape 4, 2:43

Justice Department exterior

CAMP VO

In extraordinary circumstances the law permits recording conversations between a defendant and his attorney. But with no comment from the justice department CNN has been unable to determine whether the conversations were legally recorded.

RUBINO SOT

I CANNOT IN MY WILDEST DREAMS BELIEVE THERE IS A PENDING INVESTIGATION GOING ON RIGHT NOW THAT ANY JUDGE WOULD JUSTIFY JEOPARDIZING THIS PROSECUTION IN ORDER TO SIGN THAT WIRE TAP. IT'S JUST BEYOND THE REALMS OF REALITY.

Tape 7, bite 3

CAMP VO

Frank Rubino is Noriega's attorney.

Until CNN came to him, he said he had no knowledge that conversations between his office staff and Noriega had been recorded.

Rubino and listening to tape

NAT SOUND RUBINO TO CRISTINA

(Rubino) IS THERE ANY QUESTION THAT'S YOUR VOICE??

(Cristina) NO . . . THAT'S MY VOICE.

CAMP SOT

WHAT'S YOUR REACTION?

RUBINO SOT

ABSOLUTE SHOCK. I AM ABSOLUTELY HORRIFIED, THAT THE U-S GOVERNMENT WOULD STOOP THIS LOW TO VIOLATE GENERAL NORIEGA'S CONSTITUTIONAL RIGHT TO COMMUNICATE WITH AN ATTORNEY.

Tape 7, bite 1

CAMP SOT

WHAT'S YOUR UNDERSTANDING OF THE RECORDING OF GENERAL NORIEGA'S CONVERSATIONS?

RUBINO SOT

IT'S BLATANTLY OBVIOUS WHAT THIS IS, THIS IS A RECORDING OF GENERAL NORIEGA CALLING HIS ATTORNEY'S OFFICE. SPEAKING TO ONE OF THE MEMBERS ON THE DEFENSE TEAM, CRISTINA, THE SECRETARY. WHO ACTS AS AN INTERPRETOR, SEEKING LEGAL ADVISE, ASKING US TO DO CERTAIN LEGAL THINGS IN HIS CASE.

THE GOVERNMENT HAS RECORDED THIS AND THEY HAVE DONE IT. AND IT'S THE MOST GRAVE VIOLATION OF HIS CONSTITUTIONAL RIGHTS, I HAVE EVER SEEN.

Tape 7, bite 2

CAMP SOT

ACCIDENT?

RUBINO SOT

OBVIOUSLY NOT . . . YOU DON'T ACCIDENTLY RECORD A CONVERSATION. YOU CAN ACCIDENTLY RECORD THE FIRST TEN SECONDS OR TWENTY SECONDS UNTIL YOU REALIZE OH MY GOODNESS HE'S TALKING TO HIS LAWYER, AND QUICKLY SHUTS IT OFF. YOU DON'T ACCIDENTLY RECORD AN ENTIRE TAPE.

Tape 7, bite 5 or 6

CAMP OC

IF IN FACT THE GOVERNMENT IMPROPERLY RECORDED OR MISUSED THE CONVERSATIONS OF GENERAL NORIEGA AND HIS ATTORNEYS IT COULD DERAIL WHAT HAS BEEN DESCRIBED AS THE MOST IMPORTANT FEDERAL PROSECUTION IN YEARS.

BUT THERE IS MORE AT STAKE THAN THE PROSECUTION OF NORIEGA.

HIS CAPTURE AND PROSECUTION WERE USED AS A JUSTIFICATION FOR INVADING PANAMA.

LOSING THE CASE WOULD BE A MAJOR SETBACK FOR THE DEPARTMENT OF JUSTICE AND THE BUSH ADMINISTRATION.

SO THE QUESTION IS NOT ONLY WH) RECORDED THE CONVERSATIONS, BUT WHO LISTENED.

Noriega and his supporters

GILLERS OC AND VO

IF THIS HAPPENED, AND IF THE FEDERAL GOVERNMENT HAS REALLY BEEN LISTENING TO MANY TAPES OF CONVERSATIONS BETWEEN NORIEGA AND COUNSEL AND PLANNING ITS CASE BASED ON THOSE TAPES THEN THERE'S A VERY GOOD CHANCE, AN EXCELLENT CHANCE THAT THE JUDGE WILL DISMISS THE INDICTMENT AND IT WILL NOT BE ABLE TO BE BROUGHT AGAIN. THAT WOULD BE THE END OF THE CASE.

Tape 3

I'm John Camp . . . C-N-N Special Assignment.

TAG: THIS MORNING NORIEGA'S ATTORNEY IS GOING TO COURT IN AN EFFORT TO BLOCK THE USE OF THE TAPES IN OUR BROADCAST. IN HIS MOTION HE STATED, "BOTH THIS ATTORNEY AND CRISTINA MACHIN LISTENED TO THE TAPE RECORDING, AND HAVE NO DOUBT, WHATSOEVER, THAT THIS WAS AN ATTORNEY/CLIENT PRIVILEGE COMMUNICATION THAT SHOULD NEVER HAVE BEEN RECORDED BY ANYONE WHATSOEVER, LET ALONE TO BE RELEASED ON NATIONAL TELEVISION."

Noriega 11/8/90 6:40 AM

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-79-CR

Miami, Florida
November 8 & 9, 1990

8:45 o'clock, a.m.

UNITED STATES OF AMERICA

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE WILLIAM M. HOEVELER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Government:	Myles Malman, Esq. -and- Guy Lewis, Esq. 155 South Miami Avenue Miami, Florida 33130
For The Defendant:	Frank A. Rubino, Esq. 2601 South Bayshore Drive Coconut Grove, Florida 33133 -and- Jon May, Esq. 155 South Miami Avenue Miami, Florida 33130
For CNN:	Terry S. Bienstock, Esq. 200 South Biscayne Boulevard Miami, Florida 33131 -and- Daniel M. Waggoner, Esq. 1501 Fourth Avenue Seattle, Washington 98101
Court Reporter:	Roger W. Watford Official Court Reporter 301 North Miami Avenue Miami, Florida 33128

(Tr. 4)

administrator and investigator, on the tape. General Noriega had called our office and was discussing with us certain witnesses in the case and certain forms of investigation. There is absolutely, unequivocably no doubt in my mind that that conversation was clearly an attorney/client protected conversation. When I heard this tape I was actually in shock. I was in total shock to believe that the United States government would be wiretapping conversations between lawyers and their clients. I guess, to be very candid with the court, my main argument, my main problem, is far more with the government than with CNN, but we'll address that at a later time under appropriate motions.

Here today we're asking this Court for an injunction against CNN. Our purpose is, very simply stated, we do not mean in any way, shape or form to interfere with the First Amendment rights of CNN or any other broadcast network or any other media form. What we ask, and to draw this as narrowly as possible, we ask this Court to prohibit CNN from playing on national television or any other form of broadcast any attorney/client privileged tape that they may be in the possession of. Any other forms of communication that they have received that are not of an attorney/client nature, obviously, we strenuously object to the government recording those and we more strenuously object to the

(Tr. 12)

prosecutors and their agents from turning on Cable News Network tonight. So we have a very serious threat to our ability to defend General Noriega as well as to select an impartial jury.

THE COURT: The impartial jury aspect of it has already been dealt with in Nebraska, for example.

MR. MAY: No, Your Honor. In Nebraska what they said is that one of the inquiries that this Court must make is whether or not, number one, a change of venue would assure an impartial jury, while it may be in a high publicity murder case in Nebraska you can take a change of venue to Iowa, but I can assure this Court that what CNN broadcasts is going to be broadcast to every village and city and community in this country, there's not going to be a place that you can change venue. As an alternative, the Supreme Court in Nebraska said there is the possibility of postponing the trial. Even if that is something that this Court would be inclined to do, CNN, if CNN is capable of broadcasting this tonight, whatever tapes CNN possesses now, whatever tapes CNN gets on the eve of trial, can also be broadcast, Your Honor, so postponement of trial, as an alternative suggested in Nebraska Press, is not a reasonable alternative.

And I submit the other alternative suggested that this Court consider in terms of voir dire to the jury as

(Tr. 16)

on that request, Your Honor. This matter has, not only has the FBI been asked to investigate it, but it's been asked at the highest levels, and we intend to fully and aggressively pursue the matter of how these tapes got out. That is item number one.

THE COURT: Fine.

MR. MALMAN: As a footnote to that statement, Your Honor, the trial team, myself, Mr. Sullivan and Mr. Lewis, will not participate in that investigation so that we are free and clear of any possible overflow or overspill of information that may be revealed to that extent. In addition, Your Honor, we kind of make any argument before this Court this morning in a bit of blindfolded alley. I mean we're blindfolded in an alley, so to speak. We have not heard any of these tapes that are the subject of today's court hearing. We have not seen any of these tapes which are the subject of today's court hearing. So therefore, we don't know what they contain. And I guess that is on the one hand not good because we have a lack of knowledge but on the other hand it is good as the trial team itself, and I can put this to rest right now, the trial team has not listened to, heard or been privy to any of these tapes that involve conversations between attorney and client.

THE COURT: Well, knowing you and the others on the trial team, I certainly am willing to accept that.

(Tr. 17)

MR. MALMAN: Not only that, Your Honor, but the trial team and the case agents have been instructed and advised not to hear, read, listen to, be exposed to any dissemination of any tapes or conversations between attorney and client. I want to give the Court, add that caveat to my argument today also. If I can proceed Your Honor, I would reserve on the issue of this First Amendment question until we have heard from CNN, but I wanted to address to the Court initially what our position was on the release, the unauthorized release and possession of materials which they, obviously, at some point had absolutely no right and may have committed violations of federal law in possessing, but that matter is being fully and aggressively and intensively investigated and that investigation will not cease until it's concluded one way or the other. I just wanted to again say that, Judge.

THE COURT: All right, thank you.

MR. MALMAN: All right. May I reserve my other comments to —

THE COURT: You may. Let me ask you, though, one or two questions because I have talked to the warden this morning. I understand you may have the associate warden with you.

MR. MALMAN: We do, sir.

THE COURT: I would like to clear up one or two

(Tr. 18)

facts. It's my understanding that all conversations, telephone conversations, are monitored and tape recorded unless there is a request for there to be a confidential conversation. Would you check and — is that correct?

MR. MALMAN: I have the information, all the information for the Court. Do you want it now or do you want me to —

THE COURT: Why don't we get it now as a predicate for further argument?

MR. MALMAN: Very well, Your Honor. When all conversations of all inmates at the MCC pursuant to BOP policy, all conversations are monitored, when an inmate enters the institution —

THE COURT: Does that mean they are recorded as well?

MR. MALMAN: Yes, sir.

THE COURT: All right.

MR. MALMAN: That's correct. The associate warden nods his head affirmatively.

THE COURT: Are they advised of that?

MR. MALMAN: Yes. And I can tell you exactly how they are advised of that. When an inmate enters the institution he's given a handbook in either English or Spanish for which he signs a receipt. Within that handbook the inmate is told that his conversations, all

(Tr. 19)

conversations, telephone calls, are recorded and monitored. If he wishes to have a private call between himself and counsel, he is to notify the prison authorities and arrangements are made. When an inmate tells the prison authorities that he wishes to speak to his or her attorney privately and not have the conversation monitored, those wishes are complied with by the Bureau of Prisons. In addition to this notification, there are policies on file in the prison library that are available to the inmates which explain in detail the Bureau of Prisons policy on this. In addition, there are signs all over the institution notifying the inmate that his or her calls are monitored. In addition, each and every inmate is given, in this particular case in Spanish, a waiver or a notification, an acknowledgment, if you will, Judge, that his telephone calls are monitored and that the inmate acknowledges receipt of that information and the inmate is told this, that this is done for the safety and security of the Bureau of Prisons, etcetera. And I have with me today, Your Honor, and I could hand up to the Court a copy of the acknowledgment, in this case in Spanish, signed by the defendant Noriega.

THE COURT: Could I see that?

MR. MALMAN: Yes. And I would like to mark it Exhibit 1 for purposes of today's hearing.

(Tr. 31)

do that absent an order of Court under Title 3 of the appropriate statute.

MR. RUBINO: Well, the next request I would have is to ask this Court to appoint an independent commission to investigate not only this incident but to investigate to what extent, if any, illegal wiretapping may have occurred or eavesdropping or surveillance on the lawyers, on their offices, on their home telephones, on their car telephones, in their vehicles, and to determine what, if any, extent surveillance or monitoring or bugging or wiretapping may have compromised this case and may have compromised our clearly constitutionally protected conversations with our client and our clearly constitutionally protected communications among ourselves. I ask the Court now to investigate this so I don't have to come back here in maybe a week or two or six and say look what I have now, Judge, here's the tape of my home telephone, here's the tape of John May sitting in my library with the door locked discussing the case. I think this is the tip of the iceberg. We don't know how far this has gone.

And I say to this Court this is not, though they may want to believe it, your garden variety drug case. This is a political case. This is involving a world leader who was, prior to his being the leader of the country, headed up the intelligence agency for that government for many, many

(Tr. 32)

years. This case involves the CIA, the NSA, and we all know their capabilities and I think they must be looked into. And I most respectfully request this Court to appoint some independent commission to see if this case has been compromised, maybe not particularly from the U.S. Attorney's Office so far, but from the CIA, the NSA, those people who would delve into General Noriega, into things he knows, into things he may be telling us. Your Honor, that is my request for today.

THE COURT: All right, sir, thank you.

MR. MALMAN: May I briefly respond, Your Honor?

THE COURT: All right.

MR. MALMAN: As to any request to seal, impound tapes, etcetera, I think what we're here to deal with today is Mr. Rubino's request to this Court for an injunction, any of those requests, they should be in writing, the government should have an opportunity to fully and completely brief them and respond to them. But let me say this, Judge, that there has been a lot of wild and unfettered speculation here today and accusations. What we're dealing with here, Judge, is an issue not of wiretapping but of monitoring of phone calls by the Bureau of Prisons where the person who is the subject of those phone monitorings has been notified, has acknowledged it. The defendant Noriega is the one that generated those conversations, is the one that generated the

(Tr. 66)

MR. RUBINO: Your Honor, I think we're on pretty clear ground that the tape in question is an attorney/client privilege tape. If we are not, I am prepared to call witnesses on that issue to make it more than abundantly clear that it is. And I ask the Court's posture.

THE COURT: I am coming to the conclusion, as we speak, that in order to satisfy the second prong of the preliminary injunction elements, I probably ought to hear whatever CNN has.

MR. RUBINO: May I address that right on the spot?

THE COURT: Yes.

MR. RUBINO: In order to do that, you are also going to have to do two other things. One of them is, if you are going to listen to the tape, you need to put it in context. Therefore, you are going to have to have me tell you my entire defense strategy. You are going to have to have me tell you how that tape fits within the broad category of defending General Noriega. You are going to have to have me tell you the relevance. And that, most respectfully, I refuse to do.

THE COURT: Well, I don't blame you for that, but if you need to do that then apparently no one is going to understand what those tapes are about.

MR. RUBINO: But I understand. I'm the only one in this courtroom or in this world, save the other lawyers

(Tr. 68)

want to get rid of you, but if you are going to make me do it, please don't. I think then we're going to have to go to another judge.

Let me get down to some of the issues and let's talk about what issues are at stake. Somehow CNN has moved the Court over to the area that we're talking about the degree of harm by the release. Well, the degree of harm is that there is an attorney/client privilege that has been violated. The Constitution of the United States has been violated. You can't compound that now and you can't decide, well, we're now, you know, what you really do, I tell you what you do, you would be saying, okay, there are exceptions to the attorney/client privilege, and I'm carving out a new exception, and a new exception is called the degree of harm exception. If within the secret confines of attorney/client privilege conversation there is no harm to the client it's okay to disclose that communication. That's what you do. You create an exception.

THE COURT: Not really. What CNN is saying is this: They had no part directly in creating the violation, which was done by someone that has been suggested is connected with the government. They came in to possession of the material but did not create the opportunity. They simply enjoyed the opportunity and got the tapes. Now they say that has been done and they're not concerned about

(Tr. 80)

THE COURT: Well, how many tapes do you have?

MR. WAGGONER: I don't know, Your Honor, exactly, but I am just trying to —

THE COURT: What do you mean when you say all tapes?

MR. WAGGONER: I am saying that we have already discussed the fact that there are a number of tapes and I simply am trying to understand the Court's ruling.

THE COURT: Then it would apply to any tapes that disclose the attorney/client information. If there are other tapes that don't have anything to do with the attorney/client situation I don't think they are before the Court. And you can do what you want to with them.

MR. WAGGONER: That's fine, Your Honor. I just wanted clarification on that point. Just so you know, Your Honor, I am simply not in a position to make any commitment.

THE COURT: I understand. I don't fault you for that.

MR. WAGGONER: Thank you, Your Honor.

MR. RUBINO: In all the due respect to the Court, are you leaving it up to CNN to decide what is attorney/client privilege and what is not?

THE COURT: Well, I don't know that I have any choice under the circumstances except to ask the government to tell me if they have reviewed it, and the government says

(Tr. 81)

they haven't reviewed it.

MR. RUBINO: Because I have only heard a portion of one tape. May I ask you to modify your order and restrict them from revealing the contents of any tape that involved General Noriega and his lawyers or their associates?

THE COURT: Well, in so far as the conversations are between General Noriega and the lawyers and their associates, that seems to me to come within the attorney/client privilege situation.

MR. RUBINO: I believe so too.

THE COURT: Yes. Other tapes I make no ruling on.

MR. RUBINO: We don't have a problem with that. Thank you, Your Honor.

THE COURT: All right. Is there anything else from the government at the moment?

MR. MALMAN: No, Your Honor.

THE COURT: Now, I am still in a quandry about the tapes, and I understand that an investigation has been started, and will be pressed as vigorously as possible.

MR. MALMAN: Yes, sir, with utmost vigor.

THE COURT: Yes. Do you know, not you, or does the bureau know the tapes that we're talking about, what has been disclosed and what hasn't been?

MR. MALMAN: We have no knowledge of what CNN has.

(Tr. 82)

No tapes have been played for us as has been played for Mr. Rubino. We do know when the taping began, when the taping ended, I'm sorry, the parameters of the taping, and the associated ways in which the tapes were kept. Those will be the subject, and to whom they were disseminated, if anyone, those would be the subject of the investigation and we will take appropriate steps, despite what Mr. Rubino said, to insure, number one, that the trial team is kept away from any such information, albeit internally or externally as disseminated and, number two, to look into every single avenue and possibility as to how these tapes may have been released.

THE COURT: All right. Now, one other thing I would like to do is to, is for the government, or the Bureau of Prisons to determine how many tapes there are in which he and his lawyers have been in conversation to find some way to secure those tapes beyond that which has already taken place. And while I can't really, I don't think I have the authority to order the Bureau of Prisons to do things which affect their internal security, I would like to ask, and then I will contemplate an order if this request is refused, but I would hear you further on that, I would like to ask that any further conversations between the attorneys, their representatives and General Noriega not be monitored. Is that a request that can be complied with?

(Tr. 83)

MR. STONE: Yes, Your Honor.

THE COURT: All right. Then I will make that request, that no further conversations between the lawyers, their representatives and the defendant be monitored. Any others, of course, for security purposes you would have the right to do that. As far as the request for an independent commission to investigate, I don't think that's necessary, at least at this time. The FBI is entirely competent to conduct such an investigation, and I will deny that request. I will take under consideration until later today the motion for an injunction. And I think with that, counsel, we have completed the hearing. And I thank you very much.

MR. RUBINO: Thank you, Your Honor.

(Hearing recessed at 11:10 o'clock, a.m., and reconvened at 5:55 o'clock, p.m., as follows:)

THE COURT: In as much as it's now five minutes of 6:00 and that the object of our affections, CNN, may want to know what to do, I am entering a restraining order at least until tomorrow. I will explain why in a moment. But I think they ought to know that if those tapes are aired it will be in violation of the Court's order. I hope that's taken care of the problem.

MR. BIENSTOCK: We notified them, Your Honor.

THE COURT: Yes, thank you. Now, I am preparing an order. It's not quite finished, it's in the last stages,

(Tr. 92)

will resist and will appeal the Court's ruling and, in fact, first let me state, ask the Court to stay the order pending review by the 11th Circuit.

THE COURT: I will stay the order as far as the production of the tapes is concerned. I will not stay the order as far as the continuing injunction is concerned until tomorrow.

MR. BIENSTOCK: And I would ask that, if I could file a notice of appeal from the continuation of the injunction. I have it here.

THE COURT: You may. And I might say that, and this is a non-legal comment, I would be glad to desist from this procedure if CNN considers this further and elects to act in a way or in a manner which I think comports with the desire of all involved in this case to assure that the defendant is able to have a fair trial. This is a non-legal request.

MR. BIENSTOCK: I understand, Your Honor.

THE COURT: One that can be, of course, ignored by CNN. But it's a question of responsibility and ethical reporting and the consideration of the problems that a court has in insuring any defendant but in particular this defendant, whom the world watches and our system is being watched also, to make, to make sure that a fair trial is granted not just by the Court, by the parties involved, by

(Tr. 94)

MR. BIENSTOCK: Respectfully, Your Honor, though, the First Amendment dictates that that alternative be exercised first.

THE COURT: Well, here's the problem. I don't know how many calls have been taped, and if there are 20 or 30 I have no idea which ones CNN has.

MR. BIENSTOCK: If they are all innocuous, respectfully, until the magistrate hears all the tapes and makes that determination, it is inappropriate then to inquire of the Court further.

THE COURT: I agree with you. I want to do whatever is right under the circumstances. Is the government able to produce these for me?

MR. MALMAN: Judge, we have no idea what CNN has.

THE COURT: I know that.

MR. MALMAN: We have absolutely no idea. So therefore we have no idea what to produce for the Court. That is the problem.

MR. BIENSTOCK: Judge, they have to have —

MR. MALMAN: Excuse me, counsel.

THE COURT: I can't resist the comment that somebody down there has an idea.

MR. MALMAN: It's collective thinking, Your Honor. We can produce a global mass of tapes to the Court, but that would really be, we don't know which ones they are referring

to. We have not listened to them.

THE COURT: I understand that. And I know you are not going to. And I am confident that you will, your team will do what you suggest it will.

MR. MALMAN: We will, Your Honor.

THE COURT: I would like this, though. I would like you to have somebody from MCC go through that reel, find out how many tapes there are of conversations between the defendant and anyone involved with the office of the lawyer, give me an idea, if you would tomorrow morning, as to the number of taped telephone conversations there are, specifically limited to that inquiry; that is, telephone conversations between the defendant and any one of his legal team. You think — can you do that for me?

MR. MALMAN: We will endeavor to do that as quickly as possible, Your Honor.

THE COURT: And then if there are 20 or 10 or so we can have them reproduced and I could have them up here by sometime tomorrow. If there are 150 that presents us with a different problem. So if you could get me that initial information by sometime early tomorrow morning I would greatly appreciate it.

MR. MALMAN: Judge, let's assume we did that and we produced to the Court X amount of conversations and the Court listened or the Court had the magistrate listen to X

(Tr. 96)

amount of conversations. There is, and the magistrate found them either innocuous, harmful, whatever, and the magistrate reported to the Court that conversations A through D are innocuous or they are harmful, and then the Court would then make its ruling according to that. That would have no comparison to what the being of the tapes in question are that are the result of this hearing today. In other words, the magistrate could find conversations A through D perfect and then the Court could say there is no harm, CNN, go ahead and then I'm just trying to bring to the Court a mechanical problem that I perceive, we, as we have stated our position, which is none in effect, but I, what I am saying to the Court is that if we do that, Judge, that is not the end of the problem.

THE COURT: You're right. You make a valid point, Mr. Malman. But I think I've got to take this one step at a time. I don't want you to get involved with these tapes yourself. But while I'm not looking to CNN's source, I am looking to what they have. I think we have a right to know that because there is a motion for an injunction and it's very hard to work on something like that, given that I have moved past the concept point that we discussed this morning into the facts, it is very hard for me to rule on a motion for an injunction without knowing what the facts are.

MR. BIENSTOCK: Judge, once you get the

(Tr. 97)

information from the government, through the magistrate, then the determination can be made on necessity, and there may be other alternatives for the Court to rule on that production.

THE COURT: Well, in the meantime, do me this courtesy, inquire as to where they are and have them ready just in case. Because I'm going to want to see them from some source, indeed I am going to order them from some source, and if we have got to get into a contempt type proceeding we will, of course. I don't want to have to do that unless it's absolutely necessary.

MR. BIENSTOCK: May I ask the Court at this point is there, concerning the procedural method which I think the Court is engaging in that's appropriate by having gone to the government first, I would ask the Court to vacate the portion of the order requiring CNN to produce the tapes at this time, so that need not be the subject of the appeal.

THE COURT: Sandra points out something to me that none of us have discussed, and that, it's a fair point, and that is in all this talk we have had we really don't, we really are not certain that these tapes were produced from MCC, are we?

MR. RUBINO: Your tapes.

MR. BIENSTOCK: I can — I don't know what was broadcast concerning that issue, if it's public information,

(Tr. 100)

THE COURT: All right, fair enough. That at least disposes of that.

MR. RUBINO: We know it's a conversation at MCC. Was it recorded at MCC?

THE COURT: Well, Mr. Bienstock was good enough to make that representation. We're going to proceed as I have indicated. Is there any other comment that anyone would like to make?

MR. RUBINO: If I may.

THE COURT: Yes, sir. Did you have anything further, Mr. Bienstock?

MR. BIENSTOCK: Judge, I would ask for a vacation of the order as to production of the tapes at this time pending the government producing them.

THE COURT: I will vacate that part of it until sometime tomorrow.

MR. BIENSTOCK: Thank you, Your Honor.

MR. MALMAN: Just along those lines, counsel brought up a point before, and that is, without us, the United States, getting into the fray that's happening on this side of the courtroom, counsel tells this Court that they should not be required to produce them if they are available from another source, i.e., the government. Now, if that's so, what is it that is available from the government? I don't want to beat this horse, Your Honor,

(Tr. 103)

MR. RUBINO: Yes, I testified, I didn't testify, I alluded to that earlier with Mr. Collins. He specifically showed me how it worked. So what we're doing is bad enough if they got it once, now we're sending it back in case they missed something. Can't we have someone from the magistrate's office do this, his secretary, or somebody like that? Let's get a judicial officer involved in it.

MR. MALMAN: I think, Your Honor, that we are going to have more evidence and hearings about this issue, but I, I dispute Mr. Rubino's rendition of what happened between he and Mr. Collins, the deputy warden at the time. Clearly, Your Honor, I restate, and again as I said this morning, that the general was specifically told that if he had a lawyer/client conversation that he did not wish to have monitored or recorded that it was his responsibility to let them know that that was the MCC procedures, to let them know that he did not wish to have these calls recorded and monitored.

THE COURT: Well, in any event, that's an issue and it's kind of beside the major point that we're here about. What I want to know is how many there are. I don't think that your rights will be further invaded by my having someone from MCC just tell us what the, how many tapes there are of these conversations, without reproducing them. All I want to know is the number and then I will take it from

(Tr. 105)

of United States of America versus Manuel Noriega and others, 88-0079. Mr. Rubino.

MR. RUBINO: Good afternoon, Your Honor, Frank Anthony Rubino.

THE COURT: Mr. Malman, Mr. Moscowitz, you're here for the government, Mr. McAdams I see, and Mr. Lewis as well.

MR. MALMAN: Yes, sir.

THE COURT: This hearing should be very brief actually. And Mr. Bienstock, you are here for CNN, I assume.

MR. BIENSTOCK: I am, Your Honor.

THE COURT: And I want you to know that I have received from the government under seal a list of the telephone calls made, which is indeed under seal and under safe-keeping at the present time. I am not going to go into the detail of it, but suffice it to say that the suggestions that you made and that I subscribed to yesterday would be of absolutely no value in determining what you have or don't have. So I am going to ask that CNN produce for review copies of the tapes that you have. What's your position?

MR. BIENSTOCK: Your Honor, based on the First Amendment to the Constitution of the United States, CNN respectfully declines to produce those documents, and files a motion with the Court to stay that portion of its order

(Tr. 107)

right to a fair trial, but you ask me to do it in the blind. In order words, you suggest that Nebraska, for example, protects you, but you are not giving me any idea as to what it is that is to be published. That seems to me to be patently absurd.

MR. BIENSTOCK: Your Honor, I don't ask you to do it in the blind. I ask you to do it from alternative sources first.

THE COURT: That would be physically impossible unless you and your client are willing to wait a month for a determination of the issue, which is fine with me, if you would like to do that.

MR. BIENSTOCK: Well, respectfully, I disagree, Your Honor. First of all, there are two cases right on this issue, because what the Court has done is shifted the burden of proof under the Nebraska Press case to the press, and the Court knows it's the burden of proof of the movant to prove that there would be an inability to get a fair trial. What the Court has said in its supplemental order is that that burden of proof now is on CNN to come forward and produce its papers, tapes, to prove to the Court that the disclosure of those to the public would not prejudice the defendant's right to a fair trial, and there are two cases right on this issue, Judge.

THE COURT: They don't have them. How can they

(Tr. 119)

saying to this Court, well, we can't broadcast these tapes to you or to the magistrate. It's bizarre that they could take that kind of position before this Court because if they, if they were successful in getting this Court to stay its order and then broadcast the four hundred, to four hundred million people these tapes, then they would say, well, now, the Court is in a position to rule on the —

THE COURT: I understand what you are saying. It's clearly not an invasion of their First Amendment right for us to have the tapes. That hardly permits an argument. The invasion would be in the type of order that I might enter. This is not the case of going into an editorial room, reviewing a movie before it's published or something of that nature. These are, we have an important constitutional right of privacy, and a privilege that's involved here, and unless we know what we're talking about, the Court can't rule on it.

But I do think this, that what counsel is suggesting will be handled by the Court of Appeals, because we have included that in our supplemental order, and the net effect of it will simply be to prolong, if the Court agrees with our basic procedural position, will be to simply prolong a ruling on this particular point when we have to get the tapes, listen to them, and decide what to do about them. So I think that probably the proper thing to do under

(Tr. 120)

these circumstances is to grant the stay in so far as that's concerned, but deny the stay as far as the publication of the tapes is concerned, and I will do that.

MR. BIENSTOCK: Your Honor, I have a, I don't know if, for ease of the Court, I have an order, just a generic order on the stay. I don't know if you want to type up your own or just fill in the blanks.

THE COURT: Let me take a look at it.

(Pause.)

THE COURT: Well, we'll work with it.

MR. BIENSTOCK: Your Honor, in light of — the Court made some comments about the government having produced some documents concerning the tapes to the Court for in camera or under seal, some type of inspection pertaining to I guess the number and statistical data about the tapes. On behalf of Cable News Network, we seek access to that information, and I have a motion for an order to the Clerk of the Court directing access with a supporting memorandum.

THE COURT: Are you familiar with the word hudspa, Mr. Bienstock?

MR. BIENSTOCK: Yes, and the words of the First Amendment, and Your Honor, respectfully — I will give the Court a minute to read it.

(Pause.)

court to limit access to a pretrial suppression hearing, and while the standard of proof necessary may have changed from the decision in Depasqualle through the more recent decisions of the Supreme Court, in the Press Enterprises cases, nevertheless, that case has not been overturned and this Court has the absolute right in circumstances such as here to exclude the press. I think their argument is absolutely absurd and their failure to cite the most important case on point I think is indicative of that.

THE COURT: All right. Anything else, gentlemen, to take up?

MR. RUBINO: Yes, Your Honor.

THE COURT: Mr. Rubino.

MR. RUBINO: Your Honor, as officers of the Court, we feel that we should also do our best to involve ourselves in the fact finding process and we, in fact, have and we would like to state to the Court that we, by information and belief and investigation, we have conducted, we know the Court has directed the FBI to conduct an investigation as to the source of these tapes, but we would like to advise the Court that our information and our investigation has revealed that the United States Department of State has obtained copies of all the tape recorded conversations of General Noriega that were made in the Metropolitan Correctional Institute, and our investigation has further

(Tr. 124)

revealed, Your Honor, that the United States Department of State has provided these copies to the Endara government in Panama. Our investigation and our sources in Panama have advised us, and we have checked the reliability of this, that a high placed individual in the Endara government was, in fact, the person who provided Ms. Marlene Fernandez with these tapes that CNN possesses.

THE COURT: Who is Ms. Marlene Fernandez?

MR. RUBINO: She is the CNN reporter. We would like the Court to be aware of that and we would further ask the Court or request of this Court to issue its order to Warden Pontessa, of the Metropolitan Correctional Institute, to produce in open court a list of all people and all governmental agencies or departments, whether domestic or foreign, whom they have given copies of these tape recorded conversations. We think we may get to the bottom of this quite quickly. Thank you, Your Honor.

THE COURT: All right, sir. Thank you. Any comments from counsel?

MR. MALMAN: I won't comment on Mr. Rubino's specific allegations, Your Honor. We have heard them as has the Court. And the investigation was begun before yesterday's hearing and it will be ongoing.

MR. BIENSTOCK: Your Honor, in light of what counsel just disclosed to the Court, and I don't know

(Tr. 125)

whether it's accurate or not, it seems to me it would be an appropriate, and I am going to ask the Court again, to vacate its order restraining CNN from broadcasting any portions of the tapes since counsel has just basically told the Court that they have been made available to a wide variety of persons, including those outside the United States. They have been disseminated, in essence, to the public, and CNN broadcasting them at this point is not going to make an awful lot of difference to anybody. And we submit that, in light of this type of investigation and this type of disclosure, that it militates against any prior restraint at this time.

MR. RUBINO: If CNN would acknowledge that I am correct, I may acquiesce. Otherwise, this is upon information and belief. We don't know it is a fact. They do.

MR. MAY: Also, Your Honor, the fact that the conversation may have been, as this Court is aware, the fact that an individual has improperly violated a privilege does not mean that the privilege is extinguished. The same thing for classified information.

THE COURT: Doesn't change a thing.

MR. MAY: Right.

THE COURT: Unless, of course, the defendant agrees to their publication.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-79-CR

Miami, Florida
November 10, 1990

3:30 o'clock, p.m.

UNITED STATES OF AMERICA

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE WILLIAM M. HOEVELER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Government:	Myles H. Malman, Esq. -and- Guy Lewis, Esq. -and- Norman Moscowitz, Esq. -and- Dexter Lehtinen, Esq. 155 South Miami Avenue Miami, Florida 33130
For The Defendant:	Frank A. Rubino, Esq. 2601 South Bayshore Drive Coconut Grove, Florida 33133 -and- Jon May, Esq. 155 South Miami Avenue Miami, Florida 33130
For CNN:	Terry S. Bienstock, Esq. 200 South Biscayne Boulevard Miami, Florida 33131
Court Reporter:	Roger W. Watford Official Court Reporter 301 North Miami Avenue Miami, Florida 33128

(Tr. 3)

THE COURT: All right, Mr. Rubino.

MR. RUBINO: Good afternoon, Your Honor. Let me apologize for Jon and I's appearance. We have been at the office since 6 o'clock and preparing briefs and we didn't have time to go home and change.

THE COURT: All right, that's all right. We'll proceed. It's Saturday afternoon.

MR. RUBINO: Your Honor, we have before the Court a motion to hold Turner Broadcasting System and Cable News Network in direct civil contempt of this Court's order. As the Court is well aware, a series of hearings have been had, as stated in my motion, we have had elaborate days of those hearings, and the Court obviously is most familiar with its own orders. So to jump right to the bottom line of this, we would offer into evidence at this time, Your Honor, a copy of a videotape that aired last night at approximately 6:30 p.m., as well as another videotape that aired this morning at 7:00 a.m.

MR. LEHTINEN: Your Honor, may I just apologize for interrupting Mr. Rubino? I am Dexter Lehtinen, of the United States Attorney's Office.

THE COURT: Yes, sir.

MR. LEHTINEN: Mr. Myles Malman and Guy Lewis, who you are familiar with as attorneys on the trial team of the underlying criminal case, are here today to represent the

(Tr. 4)

government and certainly will do so. But as a matter of record, I would like to indicate that if there is any possibility that any tape recordings that dealt with attorney/client privilege matters or any references will be in any way to the contents of those tape recordings the government would appreciate advance notice because Mr. Malman and Mr Lewis have been very concerned and strictly follow the rule that they should not have access to any attorney/client material. They have not had such access, they remain in the posture of having no such access, and any hearing that might inadvertently reveal that matter, if we had advance notice they would not be present.

Mr. Norman Moscowitz, senior litigation counsel in my office, is present to continue to represent the government in any matters in which that content would be revealed. But we would appreciate advance notice from either the Court or counsel should that be discussed. What Mr. Rubino has done is not discuss that, but I wanted to interrupt you, and I apologize, just in the event it were to happen, we need notice.

MR. RUBINO: Yes. I have no intent to go into it in detail. I think they speak for themselves. I would bring to the Court's attention that contained on that tape is a portion of a constitutionally protected attorney/client conversation between General Noriega and members of his

(Tr. 12)

chief judge.

MR. RUBINO: Yes, sir.

THE COURT: To see whether or not he agrees with the motion. He would then decide whether or not I ought to hear it or somebody else ought to hear it.

MR. RUBINO: Yes, sir.

THE COURT: I'm stating the rule rather loosely, but that is the net effect of it. And I think probably that's the way we should proceed.

MR. RUBINO: Yes, sir.

THE COURT: Further delay, but it is important that we comply with our rules. It is at least important that this Court comply with the law, if you get the meaning of that.

MR. RUBINO: Yes, I do, Your Honor. I think Judge King in a matter of minutes could look at the tapes. CNN has submitted it, have they not, sir?

THE COURT: Well, I am going to submit them to Judge King for his consideration. But let me hear further from Mr. Bienstock.

MR. RUBINO: Yes, sir.

MR. BIENSTOCK: Your Honor, the point of the motion is very simply what the Court said at the 5:30 hearing was without the benefit of seeing anything that was broadcast, it was hypothetically if you violate the order,

you broadcast privileged communications, you are in violation of that order hypothetically.

THE COURT: That's right. It was very clear.

MR. BIENSTOCK: We submit, Your Honor, we did not violate that order with the broadcast last night and this morning. We didn't violate the orde it was not privileged communication, and we have argumen on that.

THE COURT: It is not privileged communication?

MR. BIENSTOCK: That is our contention, and we have case law and argument to support that.

THE COURT: I will be glad to hear it.

MR. BIENSTOCK: Before I get into that, I submit Your Honor can't hear it because Your Honor last night, after reviewing the tape for the first time, without the benefit of an opportunity to be heard, to defend the CNN's conduct, determined, obviously determined, that there was a violation of the order and the reporter that published it to the world at large.

THE COURT: I thought I heard, and maybe I'm wrong, a conversation that took place between General Noriega and the attorney's office. Did I misunderstand that?

MR. BIENSTOCK: No.

THE COURT: And which witnesses were discussed, respective witnesses.

(Tr. 14)

MR. BIENSTOCK: That is correct.

THE COURT: I thought I heard that.

MR. BIENSTOCK: And we submit that is not a privileged communication under the circumstances in which it was made.

THE COURT: You mean because you had it?

MR. BIENSTOCK: No. And, as I say, Judge, I don't want to waive the recusal issue by arguing the merits of the motion. I submit that it's improper and would violate the rule. I believe the rule is clear and the motion was legally sufficient and that CNN is in conjunction with the rule and under due process rights under the Fifth Amendment is entitled to a prior hearing before a court makes up its mind as to whether or not —

THE COURT: Well, you are not entitled to a prior hearing, but you are entitled to whatever consideration the statute affords you where a motion of this type is made. And, of course, you shall have whatever the law affords you whether or not your client elects to follow the law. And that will be the subject of a determination after you have had your rights under the statute.

MR. BIENSTOCK: Yes, sir.

THE COURT: Now, does the government have any position to take on this? I'm certainly not requiring a response. But you have the right to comment if you wish to.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0079 Cr Hoeveler

Miami, Florida

November 12, 1990

UNITED STATES OF AMERICA,

Plaintiff,

v.

MANUEL NORIEGA, et. al.,

Defendant.

The above entitled cause came on for final hearing before the Hon. William Hoeveler, Judge of the above-styled court, at his office in the courthouse, Miami, Florida, on November 12 at 12:00 noon pursuant to notice.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF

Office of the United States Attorney
155 South Miami Avenue
7th Floor
Miami, Florida
BY: DEXTER W. LEHTINEN, ESQ.
NORMAN A. MOSCOWITZ, ESQ.
PATRICK SULLIVAN, ESQ.

ON BEHALF OF THE DEFENDANT

JON MAY, ESQ.
155 South Miami Avenue
Miami, Florida

ON BEHALF OF CNN

FRATES BIENSTOCK & SHEEHE
200 South Biscayne Boulevard, Suite 3160
Miami, Florida
BY: TERRY S. BIENSTOCK, ESQ.

(Tr. 3)

THE COURT: Welcome. Terry, it's your move.

MR. BIENSTOCK: Judge, I appreciate your convening this hearing on such short notice and certainly on a federal holiday, but we felt it was important in light of how this has all been proceeding that we have this meeting as quickly as possible. I think everyone recognizes, Judge, that the issue, the real core issues, have gotten sort of lost in sort of a spiral that's been happening in the flurry of activity over the last couple of days, and the real issues are what has the government done and —

THE COURT: Excuse me one second. We want this to be an open hearing. If any anyone wants to come in, they can. Thank you, anyway. Go ahead.

MR. BIENSTOCK: What the government has done and then the first amendment issue. And we intend to address the pure first amendment issue first and the prior restraining issue. However, we recognize the trouble this court and the 11th Circuit had was knowing what we have and how the court can identify whether or not that'll be a problem upon disclosure and deny General Noriega

(Tr. 4)

right to a fair trial. What we ask to propose is a way to accommodate the court's concern and to protect our first amendment rights that we've asserted throughout this case.

Let me preface by saying that CNN has no intention to telecast any attorney-client privilege conversations until it gets relief from the Supreme Court. It has not done so since the 11th Circuit ruled. This story has run its course, and there's no expectation or intention of it running again, again until the Supreme Court gives some relief.

The mechanism which we're going to propose is very similar, Judge, to what was used in the Pentagon Papers case, and that is to — what we propose is to use Magistrate Tournof (phonetic), as the court had suggested earlier and that the government go to Magistrate Tournof and disclose or identify the attorney-client conversations it has without disclosure to anyone else; that we go to Magistrate Tournof one on one and disclose to him the attorney-client conversations that we have with sufficient identification so that he can then compare the lists and determine what he needs to listen to, which the government would

then have and could produce to him specifically, and he could make recommendations to the court.

We submit that that will solve the court's threshold problem of being able to determine the issue and still preserve, I think, all the interests of the parties. What we disclose to Magistrate Tournof, we would ask that it not be disclosed to anybody else, and we would agree that reciprocally whatever would be disclosed by the government would not be disclosed to anyone else. Magistrate Tournof would be the only one with that knowledge. That is our proposal as to how we move forward on these issues.

THE COURT: What end would that serve?

MR. BIENSTOCK: That would give the court the ability to do the determination it wanted to do, and that is whether or not the publication of these conversations would impact in any significant way General Noriega's right to a fair trial and then the court can make a determination --

THE COURT: What if I decide they won't and permit to you play them?

MR. BIENSTOCK: Then we go ahead and are permitted to play them and the injunction is

(Tr. 6)

lifted.

THE COURT: That moots the issue in the Supreme Court.

MR. BIENSTOCK: I don't think so, Judge. I think it's an issue that has occurred and is capable of repetition. I don't think it moots it.

THE COURT: That's why I think you ought to keep them. Let's let it play out. Because the issue I want decided is the issue of what CNN has done in this case, and that's the issue that's going to be before the Supreme Court, whether or not a broadcasting agency can come before the court and in the one hand argue the Nebraska case and say, Judge, you have to rule on the facts to see whether or not there's damage done to the defendant and then in the next breath say, but we're not going to let you have the facts to decide it.

That's the issue that's going to be before the Supreme Court, and I think we ought to let that issue stay just the way it is before the Supreme Court. I'm reacting to your suggestion. I want to hear from other counsel.

MR. BIENSTOCK: Our concern was, assuming

(Tr. 7)

we have an order that says we can't play the tapes, number one, and number two, we have to produce the tapes, we tried to address both issues. I think what the court's suggesting, we've addressed the first issue and leave the second pending.

THE COURT: I'm not even sure I have jurisdiction.

MR. BIENSTOCK: I thought you might raise that, Judge.

THE COURT: Let's hear from other counsel.

MR. LEHTINEN: The clear intent of the court's order and the proper role of the court is to ask CNN and order them to make available the tapes they propose to play.

There's no point in going to the government. The government has no idea what tapes CNN has. The government has no intention of getting further into revelation of any tapes, if indeed they came inadvertently through some error in government process. And the easiest shortest route is, as Your Honor ordered, for seven tapes to be turned over in camera so they can be heard by a member of the bench.

Noriega's conversations were legitimately

(Tr. 8)

taped in very large numbers as Your Honor knows, taped with waivers. That may be an argument at a later point, but large numbers of tapes exist and have been ruled on by Judge Scott previously of the Southern District of Florida that such taping is perfectly legitimate. It's done in order to keep drug deals from being done on the telephones. It's done in order to keep escapes from being calculated on the telephone.

And it serves no purpose for the government to try to provide large numbers of tapes that have no relationship to the case when in fact there are seven tapes in existence that can easily be observed without any damage to CNN. There is no detriment to CNN by allowing the magistrate to listen to copies of these tapes except that it provides the evidence necessary to the court to make its findings, properly frame the issues, so then the appellate courts and the Supreme Court could have determined not the issue that Your Honor just said is properly now before the court in the appellate court, but could have determined Nebraska on its face, whether the balancing that's required under the law, given the facts and the circumstances,

(Tr. 9)

permitted their playing them or restraining them.

But there's no purpose in the government — our limited comment is there's no purpose in the government trying to provide large numbers of tapes that — when CNN has them, and we have no idea in fact whether or not they are government-made tapes or any other source.

THE COURT: Let me ask Mr. Bienstock, how many tapes did you contemplate the government was going to produce?

MR. BIENSTOCK: I don't know. We're only —

THE COURT: All other tapes than those which you have?

MR. BIENSTOCK: We're only talking about attorney-client conversation tapes. I have no idea how many the government has. It may be two. It may be twenty.

THE COURT: I do.

MR. BIENSTOCK: I understand.

THE COURT: I want to tell you there's no way we can do it within the next several months.

MR. BIENSTOCK: All they have to do is, assuming there is that list — say there are 50 attorney-client conversations that have been

(Tr. 10)

taped, and we produce five or one or ten, whatever the number is, with enough specificity so the magistrate can compare. He then knows what CNN has and what is the potential — what potential conversations could be broadcast.

MR. MOSCOWITZ: I think Mr. Bienstock is offering this compromise too late. This court ordered CNN to turn the tapes over to the court for review. At that point, they refused. The 11th Circuit has affirmed that order, saying the proper procedure and the most expeditious procedure is for CNN to do what the court has ordered, which is to turn the tapes over. Now they're offering for a compromise, which may have made sense to talk about compromise prior to the process beginning, but now it's too late. We have guidelines from the Court of Appeals what the appropriate procedure and —

MR. BIENSTOCK: The court of appeal was under the misperception that the court had not entered a stay on the production of the tapes, which the court had.

THE COURT: Well, had until they decided it. It's perfectly obvious what the decision would be in either direction. They've made that

(Tr. 11)

clear, stay or no. And obviously my stay in requiring you to produce the tapes was until the Court of Appeals ruling. The Court of Appeals has ruled. They said you should produce the tapes.

Now the thing that everybody seems to be missing — not everybody. I'm sure that many of you have it. I think the thing that we continue to permit escaping us is that I have not ruled on the merits of this case.

Now, I know that you gentlemen who are involved in First Amendment matters feel that any stay of any kind prohibiting you from publishing what you want to publish is an invasion of your right. But what you've done is present me with a situation from which I really had no escape.

That is, I cannot permit a news organ to come before me and say, we have some information that we're going to publish. We recognize that it may be in a very limited area the First Amendment versus the Sixth and the Eighth Amendment or even the Fifth Amendment, due process. We realize these amendments may be impacted by what we're going to do. We also

(Tr. 12)

realize that generally this is a factual question that the court has to decide, and we are in the unique position of having all the facts in our hands, and you're going to have to rule on this case without knowing what the facts are.

That simply could not be permitted, and that's the way the 11th Circuit saw it also. And I trust and hope that's the way the Supreme Court of the United States is going to see it because this is really not a First Amendment issue except in a very limited sense, and that is, can a news organ do whatever it wants to do regardless of what the facts are, regardless of what the issues are, in connection with the right of free speech.

I just don't think that can be the law. I think there has to be an orderly procedure. I asked for an orderly procedure. It was refused me, and I think we simply ought to go ahead and let the Supreme Court decide whether or not I was correct, whether or not the Court of Appeals 11th Circuit was correct.

To attenuate that issue now by offers of producing the tapes and letting me now rule on

(Tr. 13)

the merits is to escape the real issue in the case. Now, if you want to present me with a program which says we're going to dismiss our appeal to the Supreme Court. We're going to give the tapes to you, and we're going to let you rule on the basic question in the case, I say, fine, let's go to it. Let's go after the merits. And then if I rule against you, you can take it to the Supreme Court. And if I say you can produce what you've got to produce, fine, then this tempest in a teapot — which is all that it is, except for the very basic problems involved. But as far as this case is concerned it's a wart on our shoulder.

We're here to try to get the Noriega case to trial, and things like this just divert our course. If you want to say to me, look, we're going to produce the tapes. You look at them or you have the magistrate look at them, rule on them. If we lose, we take it up. If we win, we win. That's fine with me. I'm perfectly happy to do that and let the matter stay where it is.

MR. BIENSTOCK: The concern we had was obviously we did not want to be in a future contempt situation by preserving those issues,

(Tr. 14)

unless the court keeps the stay in place.

THE COURT: I'll consider that.

MR. BIENSTOCK: Want to chat about that?

MR. KORN: I'd like to chat about that.

MR. BIENSTOCK: Can we have a minute?

THE COURT: Indeed, while I can get exercise from time to time, I'm also long on forgiveness, if the right thing is done, so why don't you talk about it.

MR. BIENSTOCK: Thank you, Judge.

(Thereupon, a brief recess was taken, after which the following proceedings were had:)

MR. MAY: Jon May on behalf of General Noriega. I have made a proposal to CNN, which I don't know if this court will find satisfactory. So long as this court's temporary injunction remains in effect and so long as CNN agrees that it will no longer be in any further contempt of the court by broadcasting the tapes, we would not oppose a stay of the contempt hearing as well as a stay of the production of the tapes until the Supreme Court decides whether or not to consider the case on the very narrow issue.

That way we can decide the very narrow

(Tr. 15)

issue as this court has framed it. And if the Supreme Court thereafter says, well, it should be remanded for a further hearing on the merits, this way CNN is not in contempt for each day from this point on.

We're not trying to punish CNN for attempting to preserve their appellate rights. We believe they should be punished for the willful disobedience of the court's order up until this point.

But again, we would not oppose a stay from this point until the Supreme Court decides whether or not they're interested in reviewing the case. I think that's a reasonable suggestion on our side. I don't know if the court finds that reasonable.

MR. BIENSTOCK: That would be acceptable with one caveat, not waiving our claim that the tape we played is a privileged communication, just so that's clear. Mr. May termed it attorney-client privileged communication.

MR. MAY: We will have a dispute later on over that.

MR. BIENSTOCK: Other than that, we think that's a reasonable approach, and we agree to do

that.

THE COURT: Any comments?

MR. LEHTINEN: Insofar as it doesn't request the government turn over any tapes, we don't really have any comment or position on that. I would point out that the court's order dealt with a number of things, the right to fair trial, and so did the 11th Circuit talk about the right to a fair trial, notwithstanding whether there were attorney-client communications and notwithstanding whether or not the government's action in taping was perfectly legal, but nonetheless broadcasting in a broad context might jeopardize the right to fair trial.

I make that comment only because I believe the reference to attorney-client privilege is often used as a shorthand legitimately in communication but that it stands for all of the constitutional issues at play, including right to fair trial, whether or not there was any breach of the attorney-client privilege.

THE COURT: That's a fair point.

MR. LEHTINEN: With respect to the specific discussion, the government has no position.

(Tr. 17)

MR. MAY: We, of course, may be filing other motions against other parties having to do with this issue, which may require hearings independent of anything to do with CNN.

THE COURT: Is that satisfactory, gentlemen?

MR. BIENSTOCK: Yes.

THE COURT: Let's make it clear that we all understand each other. Would you recite that again?

MR. MAY: Our agreement with the court and CNN is as follows: This court's temporary injunction will remain in effect through the pendency of the proceedings that have been instituted in front of the United States Supreme Court today. The court's stay of its order of production, which had previously been announced on Friday, Saturday, whatever — I'm losing track of the days —

THE COURT: Saturday.

MR. MAY: — will also remain in effect until the United States Supreme Court rules on CNN cert petition.

THE COURT: Saturday was the Court of Appeals —

(Tr. 18)

MR. MAY: Court of Appeals ruling, yes, Your Honor. The contempt proceedings which we have requested will be stayed until the United States Supreme Court rules on CNN's cert petition.

THE COURT: Now, counsel should understand, as I'm sure you capable counsel all do, that your position on contempt really doesn't rest anymore with the decision of the Supreme Court.

MR. BIENSTOCK: We understand that.

THE COURT: You understand that. I don't want there to be any waivers in that connection. That's an independent point.

MR. BIENSTOCK: We understand that, Your Honor, and we have defenses that at the appropriate time we'll raise.

MR. MAY: No party will be waiving any arguments as to the contempt that occurred up until this point.

THE COURT: So in effect what you're suggesting and what counsel are accepting is that everything simply remains in status quo. No tapes are disclosed. The issues remain the same. And when the Supreme Court rules, either by granting a stay, which would in effect moot

the point, the basic point, or by denying the stay and referring it to the whole court, or denying certiorari, we just do nothing until we hear from the court.

MR. BIENSTOCK: When we talk about the tapes, we're talking about the attorney-client conversation tapes?

THE COURT: Who is going to make that determination?

MR. BIENSTOCK: Your Honor, that's all —

THE COURT: Is CNN going to make it again?

MR. BIENSTOCK: That's all that was in the motion that Noriega filed. That's all the court ever ruled —

THE COURT: Maybe we ought to get our facts well defined, and let's be perfectly frank with each other. May we? It's my understanding you have seven tapes, is that correct?

MR. KORN: I'm not certain of the exact number, Your Honor.

THE COURT: Do you wish not to answer that question on some constitutional basis? Then we're kind of back where we started. Let's let our hair down just a little. We all are hopefully in search of the truth, which includes

(Tr. 20)

doing what's right according to the law.

Now, if you've got something that you think you have the right to publish but you think there's some question about it, then we ought to talk about it.

MR. BIENSTOCK: Judge, we will not publish any attorney-client conversations. I think I can fairly represent, if there is any doubt on whether or not it is an attorney-client conversation, we will come to the court first.

MR. MOSCOWITZ: Does that include conversations with the staff of the attorneys as well?

MR. BIENSTOCK: Yes.

MR. LEHTINEN: In other words, the argument as to whether or not a conversation continued to have privilege with it is not the distinction you're making?

MR. BIENSTOCK: No.

MR. LEHTINEN: It's any conversation with attorney employees or with the attorney, whether or not you or any party would later argue it was or was not privileged, you are including those as tapes you won't play?

MR. BIENSTOCK: That's correct.

(Tr. 21)

MR. MAY: I have one request of CNN, sort of a technical request. I don't know what your security procedures are. Of course we're very concerned whatever tapes you possess and whatever feeds that might be — I know sometimes CNN distributes, feeds, to other news organizations that thereafter rebroadcast. I ask that you do everything possible to get in your physical possession and under lock and key all those tapes.

MR. BIENSTOCK: John, I can represent that we sent and it's been in the media that we sent notices to all of our affiliates to either return or destroy any copies they may have made of that telecast.

MR. KORN: That's correct.

One technical inch accuracy, Jon, in your description, the proceedings in the United States Supreme Court, as we sit here, have not been filed, but they will be.

MR. MAY: Right.

THE COURT: Now, the Court of Appeals seemed to expand the scope of the potential damage in its opinion to areas beyond that encompassed strictly by attorney-client

(Tr. 22)

privilege, but talked about areas that would go to the basic question of whether or not the defendant could get a fair trial. What do you think about that?

MR. BIENSTOCK: It hasn't been the subject of any motion or any court or this court's ruling. I think it's not ripe to address that.

THE COURT: I'll grant you that. What we've been talking about is attorney-client privilege, the Sixth Amendment versus the First Amendment rights.

MR. BIENSTOCK: The other aspect is simply not ripe. No one's filed anything pertaining to it, neither the government nor the defendant.

MR. MAY: There are a couple of issues as to that. As this court is aware, we have alleged that CNN got possession of these tapes essentially by way of the State Department. We're asking, until we know how these tapes, these recordings were disseminated — there are two possible scenarios here.

The government would have — I think the government would have this court believe or would certainly hope that some guard at MCC made a type and tried to sell it to some news

(Tr. 23)

organization, in which case the argument would be that since their agents had not or their prosecutors had not heard the conversations, there's a lack of prejudice, and as a result, there should not be a dismissal.

On the other hand, if in fact the situation is far more sinister, if in fact the dissemination occurred by way of the State Department, then we have something much more intentional, something much more significant, which may or may not require a showing of prejudice on the part of the defense.

At this point, we have acted with dispatch to keep CNN's dissemination of these tapes from polluting the pool of potential jurors and to keep the dissemination of other conversations which they have not already broadcast, which could really harm us, from occurring. So we have acted to minimize whatever prejudice in any possible scenario.

What we will be doing this coming week, whether or not it's through filing a motion to dismiss or filing for an inquiry or the appointment of a special prosecutor, until we get to the bottom of how these tapes were

(Tr. 24)

disseminated to the news media, it's impossible for us to know both the nature of the injury as well as the possible remedy that we might be entitled to.

MR. MOSCOWITZ: It does seem two separate issues. As I read the circuit opinion, the issue is what prejudice would this defendant suffer by broadcast and publication of these tapes. I mean, that issue can be addressed, I think, by a review of the tapes without regard to the this other issue of whether there was wrongdoing by anybody involved in CNN obtaining those tapes.

The other issue is one we're concerned about, of course, also. We've launched our own inquiry. Interviews have been going on. That's a matter which we expect the defense to bring in argue, and we're going to have to address. It makes sense to kind of so far as possible separate what is potentially a messy, large issue from what is a discrete issue, which can be handled by reviewing the seven, six, eight tapes, whatever they are.

MR. MAY: Unfortunately, Your Honor, I respectfully disagree with my former colleague

(Tr. 25)

Mr. Moscowitz. It maybe as simple as Norman suggests. It may not be. As Frank Rubino indicated to the court, depending on what is contained on those tapes, it may not be possible for the magistrate to determine how significant they are to our case without us making a very full disclosure as to the nature of our defense.

Again, in our brief to the court, we believe that's supported by the decision of the Supreme Court in the Snapp (phonetic) case where they said only the CIA knows how significant a disclosure can be. And in our case, only we can truly know, without making very open disclosure to the magistrate as to the nature of our defense. I don't think it's quite as simple as Norman suggested.

THE COURT: What do you mean recommend?

MR. MAY: Right now, before this court considers what's on those tapes and what has been disseminated, this court is going to have to try to find out just who got the tapes and who distributed them. I think until we know that — unfortunately we don't know if just CNN has these tapes or if they're floating around. I have the utmost respect for the prosecutors

(Tr. 26)

and the integrity of the prosecution team. I know when they say they haven't turned CNN on, they haven't turned CNN on.

But there are a whole bunch of people involved in the case throughout the United States government, different agencies. If the State Department had these tapes, I don't know whether the DEA had them, the CIA had them. I don't know what witnesses the government has who may have been exposed to the tapes.

We have a lot of questions that have to be answered, and it's not — before we get into issues of us having to reveal the nature of our defense, I think we have to have those questions answered first.

MR. LEHTINEN: If I could add to what Mr. Moscowitz said, the question of whether or not the court should listen to the tapes and under due process, under right to a fair trial, or under any attorney-client protected concepts, the tapes should not be played, is quite distinct from the question of what governmental misconduct, if any, is involved.

THE COURT: Indeed.

MR. LEHTINEN: In fact, the question which

(Tr. 27)

seems to be on the floor now, because there was a temporary resolution of matter that in any way touched attorney-client, and now the discussion is to be directed at tapes between Mr. Noriega and some third party that do have no connection to attorney-client, there's no question but that under Judge Scott's ruling and many rulings around the country that such tapes made at MCC may be perfectly legitimate.

That may not resolve the fair trial issue. It certainly resolves the question now being discussed is the question of tapes between Mr. Noriega and some other person unrelated to his lawyer. And those are clearly, under law and precedent, taped. Everyone knows they're taped. The written waivers cover those.

But it may not resolve the issue as to whether or not they should be played if they requested that they not be played under some fair trial concept, quite distinct from the government's right to have them and use them for whatever purpose it wanted to.

MR. MAY: Your Honor, I'm sorry. I know where we're going with this. We have not had a dispute with the government over their right to

(Tr. 28)

monitor non-privileged communications. I think what's going to come out here is the government is eventually going to agree with us that there was this tape made of communications of non-privileged matter and privileged matter, and because of their concerns of some possible coup in Panama, these tapes, all of them, including privileged matter and non-privileged matter, ended up with other agencies who made the decision to disseminate them indiscriminately.

I don't have a dispute with the government that, yeah, they had a right to monitor. They might have had a right to monitor some conversations that did not involve attorney-client communications. But again, this is not going to resolve itself as simply as the United States attorney suggests.

THE COURT: You have some tapes that apparently contain mixed conversations, that is, when I say mixed, some that clearly involve attorney-client, some that may be political in nature, with other people, or even personal in nature.

Once again, I don't know what you have, and once again, it appears that you're unwilling to

(Tr. 29)

tell me. I can only ask you to read the — as I'm sure you have, probably a couple of times — the 11th Circuit opinion.

I'm going to stay, pursuant to your agreement, the question of contempt. I'm going to stay all of the other questions that are involved pursuant to agreement pending the Court of Appeals — the Supreme Court ruling.

But the question of contempt remains, and if you elect to play a portion of the tape that seems to be in violation, not of my order, but of the order of the 11th Circuit Court of Appeals, that's a matter that you may have to again take up. I think, you better look at it that way.

It would seem to me that the discrete thing to do is to wait until the Supreme Court has taken a position, and then do what you want to do. Nobody's going to get out of breath in the meantime because they haven't heard some tape between General Noriega and his wife.

I think that's the discrete thing to do. I can't tell you what to do. I've tried that once, and it didn't do any good. But I would recommend that you follow that procedure.

(Tr. 30)

Now, I think we understand each other, that everybody is just going to stay right where they are. The matter is going to the Supreme Court.

Now I want to get practical. Aside from the fact that you have an unfavorable decision from the 11th Circuit, which I'm sure you'd rather not have on the books at this point, it would seem to me that the smart way, the inexpensive way, the reasonable way to handle this thing is to get down to the issues right now, and let's decide them rather than going any further.

MR. BIENSTOCK: On the preliminary injunction?

THE COURT: Yes, and I'm open to do that, if you want to. I would be interested in seeing what the Supreme Court does with this somewhat novel question. On the other hand, I'd like to get this disposed of so we can go on with our lives.

So I present the alternative situation to you, and that is that we stop this running around on this question and get down to the basic issue of what's in the tapes, whether or not a preliminary injunction should be imposed.

(Tr. 31)

And then if the decision is unfavorable, take it wherever you want to.

MR. BIENSTOCK: We will certainly, in light of all of this, evaluate that as an alternative and make some decision and advise the court.

THE COURT: All right. If you decide not to do that, then of course this agreement that you've entered into will be in full force and effect, which means that nobody does anything until the Supreme Court rules.

You don't produce anything. I don't look at or Judge Tournof doesn't look at anything, and we let the court rule on the record that they will have before them.

So you think. There are your two options. One is to let it proceed on the basis of the agreement that has been proposed. The other is that we stop the litigation at this point. You present the tapes.

The court through the magistrate decides whether or not they ought to be suppressed, or if so, what portions of them ought to be suppressed. And then if you don't like the ruling, you can take it further. If you do like it, someone else can take it further. All

(Tr. 32)

right?

MR. BIENSTOCK: I assume the hearing for Tuesday is off then?

THE COURT: As far as you're concerned, it is, yes.

(Thereupon the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA
COUNTY OF DADE } ss.

I, MELANIE S. GOODES, being a Registered Professional Reporter, do hereby certify that the cause of United States of America pending in the above-styled court, was heard before the Hon. Hoeveler, as Judge, on November 12, 1990; that I was authorized to and did report in shorthand the proceedings and evidence in said cause; and that the foregoing pages, numbered from 1 to 32, inclusive, constitute a true and correct transcription of my shorthand report of the proceedings at that time.

IN WITNESS WHEREOF I have hereunto affixed my hand this 12 day of November 1990.

MELANIE S. GOODES, NOTARY
PUBLIC AT LARGE.

Acuse de Recibo del Recluso

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

ada recluso debe de llenar esta forma cuando inicia, su entrada bajo la custodia del BOP. El personal tambien llenara y firmara en as partes correspondientes. Cuando un recluso desea hacer un cambio en qualquier seccion entonces esta forma se dato volver a lenar.

Nombre del Recluso _____ Numero de Registro _____ Institucion _____

1. CORRESPONDENCIA

El personal de cada institucion del Bureau de prisiones tiene la autoridad de abrir toda la correspondencia dirigide a usted antes de entregarsele. "Correo Especial" (Cartas del Presidente y Vicepresidente de EEUU., abogados, miembros del Congreso de EEUU., embajadas y Consulados, El Departmento de Justicia (A excepcion del Bureau de Prisiones pero incluyendo los abogados de la Oficina del Procurador General de Justicia), otros oficiales de ejecuciôn de la ley federal, Procurador de Justicia Estatal. Abogadois del fiscal, Gobernadores, Tribunales Federales de los EEUU. y Estatales) solamente puden abrirse ante usted para inspeccionar las por contrabando. Este procedimiento solamente ocurre si el remiteniz el o ella se identifican adecuadamente en el sobre y esta marcado Correo Especial — Ábrase solamente ante la presencia del recluso". El personal puede abrir y leer otra correspondencia.

Si usted no quiere que se abra y se lea su correspondencia general, la institucion la regresara al Servicio Postal. Esto significa que usted no recibira tal correspondencia. Usted puede elegir si quiere que se le entregue su correspondencia general fujeto a las condiciones arriba mencionadas, o que se

regrese al Servicio Postal. Cualquiera que sea su seleccion. el correo especial sera entregado a usted, después de abririo ante usted e inspeccionario por contrabando. Usted puede hacer su eleccion firmando la Parte I o la Parte II.

PARTE 1 — Correspondencia General para Regresarse al Servicio Postal.

He leido o me leyeron a la notificacion que prosigue, con relaccion al correo. No quiero que mi correspondencia general se abra y de lea. SOLICITO QUE EL BUREAU DE PRISONES REGRESE MI CORRESPONDENCIA GENERAL AL SERVICIO POSTAL. Entiendo que la correspondencia especial se me entregara, después de abrirla e inspeccionaria por contrabando.

Nombre _____ Numero de Registro _____ Fecha _____

PARTE II. — Correspondencia General para Abrirse, Leerse y Entregarse

Me leido o me leyeron la notificacion que prosigue con relacion al correro. DESEO RECIBIR MI CORRÉSPONDENCIA GENERAL. Entiendo que el Bureau de Prisones puede abrir y leer mi correspondencia general si decido aceptar la misma. También entiendo que correspondencia especial se me entregarâ después de abrirla ante mi y haya sido inspeccionada por contrabando.

Nombre Noriega, Manuel Antonio Numero de Registro 38699-079 Fecha 1/29/90

Recluso (Nombre) _____ Nûmero de Registro _____, se nego a firmar esta forma. A el (ella) se le advirtio del Bureau de Prisiones retiende para si mismo la autoridad de abrir y leer toda correspondencia general. Al recluso tambièn se advirtio que su negacion de firmar sera interpretada como una indicacion de que èl (ella) desea recibir

correspondencia gene sujeto a las condiciones arriba mencionadas.

Nombre con Letra de Molde/Firma del Miembro del Personal
/s/ MANUEL ANTONIO NORIEGA

Fecha 29 Enero 1990

2. AUTORIZACION PARA LA DISPOSICION DE FONDOS

Mientras confinado en una institucion de prisiones bajo custodia del Procurador General de Justicia de EEUU. o de la persona èl norrada, a un recluso se le prohibe recibir directamente o poseer (a menos que tenga autorizacion de la institucion local) (illegible) el efecctivo o cheques, u otras formas de instrumentos negociables. Para llevar las cuentas de los fondos recibidos a nombre recluso, El Bureau de Prisiones establece para cada recluso una Cuenta de Fondos Fiduciarios para Prisoneros. El Director Bureau de Prisiones o la (s)persona (s) numbrada (s) por el Director funciona como custodio de los fondos que recibe el rec (illegible) esta encarcelado bajo la custodia del Procurador General de Justicia de EEUU.

(Illegible) presente (autorizo) (no autorizo) (tache la que no quiera) el Director del Bureau de Prisones, o a la (s) persona (illegible) (s) por el Director o el Alcaide o la (s) persona (s) autorizada (s)por el Alcaide en esta o en otra institucion federale (illegible) puedo ser recluido posteriormente, para que endosen todos mis cheques, ordenes monetarias, o giros Bancarios, (illegible) instrumentos negociables, para que se depositen y se acrediten en mi Cuenta de Fondos Fiduciarios para Prisioneros por (illegible) yo prisonero en el Bureau de la Prisiones. Entiendo que si no proveo esta autorizacion autorizaciôn, no podré (illegible) monetarias, o giros bancarios u otras formas de instrumentos negociables mientras estoy encarcelado (a).

(illegible) doy por enterado que todos los instrumentos negociables que se me envien deberan de referirse a mi nombre y a mi (illegible) para proveer un deposito adecuado a mi cuenta. Si mi nombre y numero de registro no estan como referencia, el oficial Oficina de Correos de la institución puede devolver el instrumento negociable al remitente.

Firma del Relcuso /s/ Manuel Antonio Noriega

Fecha 29 Enero 1990

Recluso (Nombre) _____ Nùmero de Registro _____, se nego a firmar esta forma. A èl (ella) advirtio que su negacion a firmar esta forma sera interpretada como una indicacion que él (ella) no autoriza al Bureau de Prisiones que endosen sus cheques, ordenes monetarias, o giros Bancarios, u otros formas de instruments negociables para deposito y credit su Cuenta de Fondos Fiduciarios para Prisioneros y que èl (ella) no recibira dichos fondos mientras permanezca encarcelado (a).

Nombre con Letra de Molde/Firma del Miembro del Personal

_____

Fecha _____

Distribucion: Original — Expediente Central, Copia — Recluso. Reemplaza B-P Formas 61 & 69 las Registro-109. Feb. 1984.

3. MONITORIZACION DE LAS LLAMADAS TELEFONICAS DE LOS RECLUSOS

El Bureau de Prisones reserva la autoridad de monitorizar (esto incluye grabar) conversaciones en qualquier telefono localizado dentro de la institucion, dicha monitorizacion se hara para conservar la seguridad y el orden administrativo de la institucion y para proteger al poblico. El uso de los telefonos de la institucion por el recluso constituye su consen-

timiento a esta monitorizacion. Las llamadas a un abogado, hechas como los reglamentos indican, no seran monitorizadas.

He leido o me leyeron (tache la que no quiera) la notificacion arriba mencionada sobre la monitorizacion de las llamadas telefonicas de los reclusos. Me doy por enterado que las llamadas telefonicas que yo haga de los telefonos de esta institucion las pueden monitorizar y grabar.

Firmo del Recluso /s/ Manuel Antonio Noriega

Fecha Enero 29, 1990

Por la presente certifico que la informacion arriba mencionada fue (tache las declaraciones incorrectas) (provista al recluso para que la leyera) y la (leyo y se le explico cuidadosamente al recluso arriba mencionado). El recluso (firmo/ (se nego a firmar).

Nombre con letra de Molde/Firma del Miembro del Personal

(illegible)

Fecha 1/29/90

NOTIFICACION EN CASO DE MUERTE/ENFERMEDAD, DISPOSICION DE PROPIEDAD

En caso que yo muera, ordeno que mi Esposa (parentesco), cuyo nombre es Felicidad (illegible) con domicilio en (illegible) se le notifiqu y que todas mis efectos personales, incluyendo el dinero que queda en mi cuenta, o dinero que me deba el Bureau de Prisones, le sean remitidos a el o a ella.

En caso de que el personal del Bureau de Prisones no pueda localizar la persona arriba mencionada, despues de una bus-

queda razonable, autorizo la substitucion de la siguiente persona en su lugar.

(illegible)	12405 SW 56th Street, Miami, FL 33175
Nombre (Parentesco)	Direccion

En caso que ninguno de los individuos arriba mencionados pueda localizarce, despues de una bosqueda razonable, autorizo al Bureau de Prisones que remita las propiedades arriba mencionadas a cualquier miembro de mi familia como puede ser indicado en mi lista de visitas, o en la ausencia de tal a cualquier otra persona en dicha lista.

Ademas estoy de acuerdo que se disponga de mi propiedad personal localizada en la instituc on de esta prision, incluyendo ropa, de acuerdo con los reglamentos del Bureau de Prisones.

En caso de una enfermedad seria u otra emergencia, autorizo a la institucion que se ponga en contacto con las personas arriba mencionadas para que se les notifique de mi condicion. Tambien deseo y autorizo que los siguientes personas sean notificados.

Nombre	Parentesco	Direccion	Numero de telefono

Firma del Recluso /s/ Manuel Antonio Noriega Fecha Enero 29-1990

Por la presente certifico que la notificacion arriba mencionada fue (tache la declaracion incorrecta) (proveida al recluso para que la leyera) y fue (teida y explicada explicitamente) al recluso arriba mencionado) ante el recluso (firmo) (se neco a firmar) esta notificacion, a los 29 dias del mes de Enero de 1990.

Nombre Impreso/Firma del Miembro del Personal
(illegible)

Fecha 1/29/90.